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Seclusion in (Fiscal) Paradise Is Not an Option: The OECD Harmful Tax Practices Initiative and Offshore Financial Centers

Miguel González Marcos*

Introduction

A new international standard for exchange of information on tax matters has emerged.[1] This new standard of cooperation on tax matters seeks to curtail, when not eradicating, the possibility of using so-called tax havens for tax evasion.[2] This standard presses for each jurisdiction to have an adequate legislative and regulatory framework to provide information requested by another jurisdiction to enforce its tax laws.[3] This standard of cooperation on tax matters, as

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1. *See* Doug Shulman, Prepared Remarks of IRS Commissioner before the 23d Annual Institute on Current Issues in International Taxation, IR-2010-122 (Dec. 9, 2010) (commenting that the landscape of international taxation "is changing . . . in profound and meaningful ways," referring particularly to improvements in differentiating between legitimate uses of cross-border structures by, for example, multinational corporations and "individuals hiding their money in foreign tax havens"). *See generally* Teh Shi Ning, *S'pore to Amend Tax Laws to Comply With OECD Standard; Draft to Be Aired in Mid-Year; Talks With Some Countries to Update DTAs Started*, BUS. TIMES SING., May 29, 2009 (indicating that Singapore was making attempts to comply with new international standards regarding the exchange of information relating to tax issues).

2. *See* Ruth Mason, *U.S. Tax Treaty Policy and the European Court of Justice*, 59 TAX L. REV. 65, 100 (2005) (stating the OECD seeks to curtail harmful tax competition by eliminating tax havens); *see also* Organization for Economic Co-operation and Development (OECD), THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES: A BACKGROUND INFO. BRIEF 4 (Jan. 27, 2011), http://www.oecd.org/ dataoecd/32/45/43757434.pdf (hereinafter OECD: BRIEF) (indicating that the new standards for the exchange of information are meant to address the problem of hiding "income and assets" to evade taxes).

3. *See* Anthony McFarlane & John Ridgway, *Australia: Vanuatu Improves Transparency With International Company Reforms—Registration of Bearer Shares*, MONDAQ (Australia), Dec. 12, 2010, http://www.mondaq.com/australia/article.asp?articleid=117914 (indicating that the international tax standard requires disclosure of any tax-related information requested by a party to a tax information exchange agreement so it could enforce its tax law); *see also* Michelle Quah, *The Evolving Global Tax Landscape; Firms With International Operations or Those Looking to Invest Overseas Should Be Aware of the Implications*, BUS. TIMES SING., Oct. 20, 2010 (reporting on the OECD's international tax standard and its requirement to provide tax information upon request to promote the enforcement of domestic tax law).

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articulated in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters,[4] as well as in the OECD Model Tax Convention on Income and on Capital,[5] gained generalized acceptance.[6] In 2008, the United Nations Model Tax Convention incorporated that standard,[7] and in 2009, the G-20 declared its readiness to undertake sanctions against those uncooperative jurisdictions or tax havens reluctant to adopt it.[8] Since then, the number of jurisdictions adopting that standard of cooperation on tax matters—via Tax Information

4. *See* OECD, Tax Info. Exch. Agreements (TIEAs), *Model Agreement on Exch. of Info. on Tax Matters, Developed by the OECD Global Forum Working Group on Effective Exch. of Info.*, http://www.oecd.org/document/7/0,3343,en_2649_33767_38312839_1_1_1_37427,00.html (acknowledging that the OECD's Model Agreement sets the standard to facilitate the exchange of information relating to tax issues); *see also* Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 BROOK. J. INT'L L. 783, 786 (2009) (recognizing that the OECD's Model Agreement on Exchange of Information on Tax Matters promotes the cooperative exchange of tax information).

5. *See* OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION 38 (OECD Publishing, 8th ed. 2010), http://browse.oecdbookshop.org/oecd/pdfs/browseit/2310081E.PDF (hereinafter OECD: CONDENSED VERSION) (providing article 26 of the Model Convention, which deals with the exchange of information); *see also* Edith Palmer, *Switzerland: Exchange of Tax Information*, GLOBAL LEGAL MONITOR, Sept. 3, 2010, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402212_text (acknowledging that the Model Tax Convention on Income and on Capital sets standards on the exchange of tax information).

6. *See OECD Global Forum Consolidates Tax Evasion Revolution in Advance of Pittsburgh*, STATES NEWS SERVICE, Sept. 2, 2009 (reporting that the OECD's standard for the exchange of tax information has been widely accepted); *see also India Substantially Implemented Int'l Tax Standards: OECD*, PRESS TRUST OF INDIA, Aug. 31, 2009 (acknowledging India's compliance with standards on information exchange that are generally accepted throughout the world).

7. *See* U.N. DEP'T. OF INT'L ECON. & SOC. AFFAIRS, *United Nations Model Double Taxation Convention Between Developed and Developing Countries* at 351 (2001) (stating that the U.N. Model Tax Convention reflects the OECD Model Convention's provisions on the exchange of information); *see also* David Spencer, *The Code of Conduct on Cooperation in Combating International Tax Evasion*, 26 INT'L ENFORCEMENT L. REP. 45 (2010) (indicating that the United Nations Model Tax Convention promotes the efficient exchange of tax information mainly through the use of bilateral agreements).

8. *See* G-20, COMMUNIQUÉ: THE GLOBAL PLAN FOR RECOVERY AND REFORM 4 (2009), http://www.g20.org/Documents/final-communique.pdf (declaring that the G-20 participants are willing "to take action against non-cooperative jurisdictions, including tax havens, [and] stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over."); *see also* G-20, COMMUNIQUÉ: THE G-20 SEOUL SUMMIT LEADER'S DECLARATION 13 (2010) (affirming the G-20 "commitment to preventing non-cooperative jurisdictions from posing risks to the global financial system, and welcom[ing] the ongoing efforts by the FSB (Financial Stability Board), Global Forum on Tax Transparency and Exchange of Information (Global Forum), and the Financial Action Task Force (FATF)"); *cf.* Joseph J. Norton, *Comment on the Developing Transnational Network(s) in the Area of International Financial Regulation*: *The Underpinnings of a New Bretton Woods II Global Financial System Framework*, 43 INT'L LAWYER 175, 187 (2009) (characterizing the G-20 as a new transnational network).

Exchange Agreements (TIEAs),[9] Double Taxation Conventions (DTCs),[10] or protocols modifying existing DTCs—has grown so dramatically that there is almost no doubt about its universal acceptance today.[11]

The emergence of this international standard implies necessarily a shifting in the notion of sovereignty on tax matters. When the Harmful Tax Practices Initiative (HTPI) of the Organization for Economic Co-operation and Development[12] names, and shames, certain countries with offshore financial centers operating as fiscal paradises or tax havens, some of them answer with outcries of radical sovereignty.[13] This article shows that instead of interpreting the emergence of that standard as impinging upon their sovereignty, governments should see it as a way of gaining a transparent sovereignty, but sovereignty nonetheless that is necessary for global governance. After pointing out the lack of transparency challenge in using tax havens in international transactions, this article describes the pressures toward more transparency on tax matters, the consequences of being blacklisted, the implementation of transparency standards and cross-border information, and the necessity of balancing sovereignty and transparency on tax matters. Although the process of implementing the standard on exchange of information is well advanced in the peer review phase in which the legal and regulatory framework of jurisdictions is evaluated to determine compliance with that standard,[14] the article concludes with suggestions about what to consider and how to proceed in adopting the emergent international stan-

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9. *See* James K. Jackson, *The OECD Initiative on Tax Havens*, CRS REPORT FOR CONGRESS 12 (2010) (explaining that at least 44 TIEAs bind OECD members and nonmembers to cooperate on tax matters through the exchange of information).

10. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES PEER REVIEWS: INDIA 2010: PHASE 1, at 59 (2010), http://dx.doi.org/10.1787/9789264095533.pdf (informing that many jurisdictions such as India, Finland, Austria and Greece have established DTCs as a standard of cooperation and exchanging information necessary to carry out agreements on tax matters).

11. *See* OECD: BRIEF 17 (2011), http://www.oecd.org/dataoecd/11/57/46084660.pdf (highlighting the huge increase of TIEAs and DTCs signed from 2000 to January 2011); *see also* Helen Burggraf, *Rush to OECD "Altar" Continues, as More Countries Agree to TIEAs*, INTERNATIONAL ADVISER.COM, July 22, 2009, http://www.international-adviser.com/article/rush-to-oecd-altar-continues-as-more-countries-agree-tieas (claiming that with many countries signing TIEAs and DTCs, there is a global move toward greater tax transparency).

12. *See* Ronen Palan, *Offshore and the Structural Enablement of Sovereignty, in* OFFSHORE FINANCE CENTERS AND TAX HAVENS: THE RISE OF GLOBAL CAPITAL, 18, 28 (Mark P. Hampton & Jason P. Abbott eds., 1999) (citing Bermuda, the Bahamas and the Caymans as examples of countries with offshore financial centers operating as tax havens); *see also* BRUCE ZAGARIS, INTERNATIONAL WHITE COLLAR CRIME: CASES AND MATERIALS 37 (2010) (noting that some countries targeted by the HTPI of the OECD have made participating in HTPI contingent on the OECD and other countries agreeing to a level playing field in the financial services of these targeted countries).

13. *See* Palan, *supra* note 12; *see also* Zagaris, *supra* note 12.

14. *See* OECD: BRIEF 2 (2011), http://www.oecd.org/dataoecd/11/57/46084660.pdf (stating that of the Global Forum's 10 new peer review reports on exchange of information, five reports analyze the legal and regulatory framework of the reviewed jurisdictions); *see also* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES: STATEMENT OF OUTCOMES 2 (2010), http://www.oecd.org/dataoecd/1/49/46107244.pdf (acknowledging that the Global Forum's first eight peer review reports each involved an assessment of a certain jurisdiction's legal and regulatory framework).

dard of co-operation on tax matters. Coordinating the exchange of information on tax matters between countries does not mean the end of sovereignty.[15] On the contrary, to be successful, such coordination requires efficient governments with transparent, accountable sovereignty, sensitive to their role in global governance but, also, with a renewed zeal for protecting privacy and individual freedom.[16]

Lack of Transparency and Offshore Financial Centers

Tax policy coordination initiatives between onshore and offshore financial centers were proposed over the years for financial and security reasons.[17] Concerns about how the "global tax policy framework" influences systemic failures "are not new," as John Christensen of the Tax Justice Network points out.[18] For instance, in 1923, the issue of finding agreement on "common global principles for taxing business" was raised in the League of Nations.[19] Later, in 1944, "the US Department of Commerce identified its own concerns about the scope for businesses to avoid tax through transfer pricing, and the issue was also discussed at Bretton Woods."[20]

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15. *See* OECD, IMPLEMENTING THE TAX TRANSPARENCY STANDARDS: A HANDBOOK FOR ASSESSORS AND JURISDICTIONS 159 (2010) (asserting that countries maintain sovereignty despite exchanging information over tax matters); *see also* Diane M. Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation,* B. C. L. SCH. FACULTY PAPERS, Jan. 28, 2009, at 10 (noting that although cooperation in exchanging information between countries curbs certain competitive behaviors, competition still exists).

16. *See* C.R. Ewell, *Telemedicine: Overcoming Obstacles on the Road to Global Healthcare*, 12 CURRENTS: INT'L TRADE L.J. 68, 75 (2003) (opining that space treaties have procedures for both private and governmental participants that are predictable, transparent, and consistent); *see also* Alexander Gillespie, *Transparency in International Environmental Law: A Case Study of the International Whaling Commission*, 14 GEO. INT'L ENVTL. L. REV. 333, 348 (2001) (concluding that the International Whaling Commission's approach of increased transparency has resulted in protection of citizens' interests and accountability).

17. *See* Rachel L. Loffler, *Bank Shots*: *How the Financial System Can Isolate Rogues*, 88 FOREIGN AFF. 101, 101 (2009) (stating that "[o]ver the last five years, U.S. national security policy and the international banking system have become inextricably intertwined"); *see also* International Monetary Fund [IMF], Monetary and Exch. Affairs Dep't, *Offshore Financial Centers: The Role of the IMF,* at ¶¶ 37–38 (June 23, 2000), *available at* http://www.imf.org/external/np/mae/oshore/2000/eng/role.htm#10 (explaining that the first step of the proposed Fund approach to the assessments of Offshore Financial Centers is for the Fund to invite all pertinent offshore and onshore centers to meetings).

18. *See* John Christensen, Tax Justice Network, *Tax Avoidance, Tax Havens and the Genesis of the Tax Justice Network*, at 1 (Jan. 2005), http://www.evb.ch/cm_data/public/JChristensen_0.pdf (recognizing that the concerns of the systematic failures of the global tax policy framework are reoccurring).

19. *See id.* (noting that in 1923 the League of Nations recognized that common global principles for taxing business profits were needed); *see also* Michael J. Graetz, *Principal Paper: Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1394 (2001) (stating that in 1923, economist Edwin R.A. Seligman began arguing that the primary focus in taxing international income should be considerations of fairness).

20. *See* Christensen, *supra* note 18 (commenting that in 1933, the U.S. Department of Commerce discussed concerns about the scope for businesses to avoid tax through the use of transfer pricing, and this same issue was discussed in 1944 at Bretton Woods); *see also* Hal S. Scott, An Overview of International Finance: Law and Regulation 70 (Dec. 15, 2005) (unpublished chapter) (on file with Harvard Law School), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=800627 (stating that "there is an inexorable pressure to harmonize the rules of international finance, and to increasingly delegate power to international organizations to formulate and enforce such rules, due to concerns with international stability, economic efficiency and the drawbacks of alternative approaches").

In the search for a coordination mechanism between onshore and offshore financial centers, since at least 2000, international organizations have harshly criticized the role of tax havens[21] because they: "(1) rob prosperous industrialized countries of their tax revenues; (2) permit too much bank, corporate and individual secrecy; and (3) lack vigor in the fight against money laundering."[22] To address those issues raised by tax havens, initiatives on taxation by the

> Organization for Economic Cooperation and Development (OECD) and the European Union (EU) [are] paralleled by the Financial Action Task Force (FATF) and the International Monetary Fund (IMF), the former concerned with money laundering, the latter with the systemic risk that poorly regulated OFCs pose to the world's financial markets."[23] The common theme among those initiatives is the need for "increasing the transparency of

21. *See* Benjamin R. Hartman, *Coercing Cooperation From Offshore Financial Centers: Identity and Coincidence of International Obligations Against Money Laundering and Harmful Tax Competition*, 24 B.C. INT'L & COMP. L. REV. 253, 260 (2001) (reporting in 2000 that any jurisdiction still on the List of Tax Havens Jurisdictions on July 31, 2001, which have not made a commitment to eliminating tax practices would be put on the List of Uncooperative Tax Havens); *see also* George M. Melo, Comment, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty?*, 12 PACE INT'L L. REV. 183, 188–89 (2000) (discussing how high tax countries have sought aid from international organizations to coordinate a counter against the negative effects of tax havens on their national tax bases).

22. *See* 1 WALTER H. DIAMOND ET AL., TAX HAVENS OF THE WORLD 10 (Matthew Bender ed., 3d ed. 2010) (noting that in the spring and early summer of 2000, three international organizations resorted to "naming and shaming" jurisdictions because they robbed prosperous countries of their tax revenues, permitted too much corporate and individual secrecy, and lacked force in the fight against money laundering); *see also* Ilan Benshalom, *The Quest to Tax Financial Income in a Global Economy*: *Emerging to an Allocation Phase*, 28 VA. TAX REV. 165, 172–73 (2008) (concluding that "[t]he unregulated and untaxed offshore financial sector has developed gradually in the shadows of emerging global financial markets, with the implicit consent of developed countries." Further, the author points out that there was a shift in tax planning in the 1970s, "when United States corporations formed foreign subsidiaries to overcome tax and regulatory access barriers to the Eurobonds markets. This practice, along with early tax legislation of the Reagan Administration that encouraged tax planning, induced an ever-growing hunger in the corporate sector for tax arbitrage profits during the early 1980s.").

23. *See* Gregory Rawlings, *Responsive Regulation, Multilateralism, Bilateral Tax Treaties, and the Continuing Appeal of Offshore Finance Centres* 1 (The Austl. Nat'l Univ., Working Paper No. 74, 2005), *available at* http://ctsi.anu.edu.au/publications/WP/74.pdf (acknowledging that while the OECD and EU are concerned with money laundering, the FATF and IMF are concerned with the risks poorly regulated Offshore Finance Centers pose to financial markets); *see also* Walter Perkel, Note, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 186–87 (2004) (discussing how the FATF is combating international money laundering by requiring nations to enact legislation similar to U.S. money laundering legislation).

> operations in offshore financial centers and on broadening their cooperation and tax law enforcement matters with other countries.[24]

Regardless of the progress made over the years to improve coordination between onshore and offshore financial centers, now, due to the Great Recession, abuse of the use of tax havens may increase the risk of systemic failures[25] and has become an urgent priority.[26] Even if the role of tax havens in the Great Recession were overstated or misinterpreted, as some commentators suggest,[27] the lack of transparency of transactions using tax havens became an unbearable bur-

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24. *See* George M. von Furstenberg, *The Economics of Offshore Financial Services and the Choice of Tax, Currency, and Exchange Rate Regimes*, 19 J. FIN. TRANSFORMATION 49, 60 (2007), http://ssrn.com/abstract=925885 (explaining that the current focus on transparency has demonstrated positive progress thus far in the European Offshore Financial Centers); *see also* David Spencer, *Cross-Border Tax Evasion*, 20 J. INT'L TAX'N 45, 49–50 (2009) (illustrating that tax havens have both worsened the current financial crisis and facilitated tax evasion due to a lack of transparency).

25. *See* Spencer, *supra* note 24, at 47–48 (outlining factors surrounding tax haven jurisdictions as a significant contribution to systemic risk problems); *see also* Symposium, *Constitutionalism in an Era of Globalization and Privatization*, 6 INT'L. J. CONST. L. 457, 467 (2008) (highlighting that systemic security problems arise from illegal exploitation of offshore financial centers).

26. *See* ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS, OUTCOME: THE G-20 SUMMIT 4 (April 2009), http://www.acca.org.uk/pubs/about/public_affairs/unit/global_briefings/G20_update.pdf (commenting that the "era of banking secrecy is over"); *see also* Neil Hodge, *A Taxing Issue*, INT'L BAR NEWS, Aug. 2009, at 21, http;// www.ibanet.org/Article/Detail.aspx?ArticleUid=0A7B544C-D336-4127-A9DB-CCBA0BDF06F8 commenting that with the current financial crisis, "the world's largest countries have come together to highlight the problems of tax havens."). *But see* Roger C. Altman & Richard N. Haass, *American Profligacy and American Power*: *The Consequences of Fiscal Irresponsibility*, 89 FOREIGN AFF. 25 (2010) (warning about the fiscal and economic implications of the "historically unprecedented and ultimately unsustainable rate" of U.S. govern-ment debt). *See generally* Aaron Task, *IRS "Turning Over Every Rock" to Raise Revenue*: *Obama Targeting Overseas Assets*, YAHOO! FINANCE, July 10, 2009, http://finance.yahoo.com/techticker/article/277731/IRS-%22Turning-Over-Every-Rock%22-to-Raise-Revenue-Obama-Targeting-Overseas-Assets?tickers=%5ED JI,%5 EGSPC, UBS, HRB, INTU,JTX (emphasizing that U.S. citizens face potential tax hikes as well as greater enforcement regarding sending money to tax havens).

27. *See* Geoffrey Loomer & Giorgia Maffini, *Tax Havens and the Financial Crisis*, April 2009, 1–2 http:// www.sbs.ox.ac.uk/centres/tax/Doctments/policy_articles/TaxHavensandtheFinancialCrisis.pdf (arguing that the main challenge with regard to using Structure Investment Vehicles (SIVs) was not their offshore location but "their off-balance sheet status (leading to information failures and low capital ratios) and their business model (they use short-dated commercial paper to fund investments in longer-dated assets")). *See generally* Charou Malhotra Naik, *Tax Havens 2010—Focus on India*, 21 J. INT'L TAX'N 50, 50–52 (2010) (emphasizing that tax havens' legitimate tax planning purposes are overlooked in the context of economic recession).

den.[28] Hence, the search for a new global financial architecture yielding better coordination and transparency on tax matters is now paramount.[29]

With estimates of as much as five to seven trillion dollars of offshore deposits, offshore financial centers play an important role in the international financial system.[30] Some of the motivations for using offshore financial centers are "high taxes in the country of residence, unfavorable inheritance rules in the country of residence, need of anonymity and secrecy, re-routing of export sales, expansions of multinational corporations, among others."[31] In tax-structuring activities there is a differentiation between cross-border tax arbitrage, cross-border tax competition, and tax shelters. Cross-border tax arbitrage refers to taking advantage of

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28. *See* Loomer & Maffini, *supra* note 27 (conceding that incorporation of the Structure Investment Vehicles (SIVs) in offshore locations heightened the lack of transparency of investment transactions.); *see also* John Christensen, *Transparency, Transparency, Transparency: Three Proposals for Strengthening International Financial and Fiscal Regulatory Cooperation*, Heinrich Böll Stiftung, June 2009, at 2 (arguing that the financial crisis brought to light how the lack of transparency of certain offshore jurisdiction hinders the work of regulatory and tax authorities).

29. *See* ERNST & YOUNG, PERSPECTIVES ON THE LONDON SUMMIT 11 (2009), http://www.mahbubani.net/articles%20by%20dean/Issues_Perspectives_on_the_London_Summit%20April%202009.pdf stating that "[t]he issue of increased transparency and raising revenues will inevitably bring focus on a number of areas. For example, the approach to the future of tax havens has been the subject of vigorous debate and many governments may wish to limit their use"); *see also* Department of State Washington File, Eizenstat on Global Taxation Standards, July 26, 2000, http://usinfo.org/wf-archive/2000/000727/epf409.htm (explaining how harmful tax competition and cross-border arbitration issues can be better addressed through cooperation). *See generally* Reuven S. Avi-Yonah, *The Obama International Tax Plan: A Major Step Forward* (Univ. of Mich. Law Sch., The John M. Olin Center for Law & Economics Working Paper Series No. 149, 2009), *available at* http://ssrn.com/abstract=1400624 (commenting that "the Obama proposals (the 'Obama Plan') introduce a 21st Century version of the vision begun by Thomas Adams in 1918 and continued by Stanley Surrey in 1961: A world in which source and residence taxation are coordinated so as to achieve the underlying goals of the international tax regime"); *see also* OECD CURRENT TAX AGENDA 22 (2010) (recognizing the importance of high standards of transparency and information exchange to combat international tax evasion).

30. *See* JACK A. BLUM ET AL., FINANCIAL HAVENS, BANKING SECRECY AND MONEY LAUNDERING, UNITED NATIONS, OFFICE FOR DRUG CONTROL AND CRIME PREVENTION 33 (1998) (pointing out that bank secrecy and offshore financial centers play a legitimate role in the financial system). *See generally* WALTER H. DIAMOND ET AL., 1 TAX HAVENS OF THE WORLD 2 (Matthew Bender 2010) (classifying the types of tax havens as "(1) tax exemption; (2) low taxation; (3) tax exemption of foreign source income; (4) special incentive privileges; (5) tax exemption for manufacturing and export processing; (6) international business company or international company tax reduction; and (7) offshore banking units.").

31. *See* ANTHONY S. GINSBERG, TAX HAVENS 8 (1991); *see also* JOSEPH ISENBERG, INTERNATIONAL TAXATION: U.S. TAXATION OF FOREIGN PERSONS AND FOREIGN INCOME, at p. 1:23–24, vol. 1, section 1.14, (3d ed. 2004) (explaining that "tax havens can arise in different contexts when the taxing rules of one country combine unexpectedly and favorably with those of another"); *see also* Daniel J. Mitchell, *Why Tax Havens Are a Blessing*, CATO INST., Mar. 18, 2008, http://www.cato.org/pub_display.php?pub_id=9283 (accessed June 8, 2009) (identifying privacy, job security, and enhanced economic growth as attractive policies underlying tax haven use).

inconsistencies between different countries' tax rules, even when two countries have well-designed and well-operated tax systems.[32] Tax competition refers to taking advantage of the interplay between weak/permissive and strong/strict tax regimes.[33] Tax shelters "are typically concerned with the ambiguous margins of tax rules, sometimes flirting with legality by engaging in transactions with little or no economic substance."[34] The legislative and regulatory framework of offshore financial centers facilitates those cross-border tax-structuring activities.[35]

There are, however, legitimate, as well as illegitimate, purposes for using offshore financial centers.[36] Legitimate purposes include assisting international financial and commercial activity—specifically for the United States—by facilitating "the formation of investment funds by U.S. managers for their international investors for foreign investment into the U.S. and the export sale of U.S. products."[37] This facilitating role of offshore financial centers becomes particularly useful when tax laws and regulations contain imperfections hindering a transaction,[38] "[s]o a tax haven entity can be used as a very efficient pass-through for unexciting but impor-

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32. *See*, *e.g.*, H. David Rosenbloom, *The David R. Tillinghast Lecture International Tax Arbitrage and the "International Tax System,"* 53 TAX L. REV. 137, 142 (2000) (defining cross-border tax arbitrage and its implications); *see also* Adam H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 557 (2007) (describing how a taxpayer can use cross-border tax arbitrage to lighten her tax burden).

33. *See* Mark Boyle, *Cross-Border Tax Arbitrage—Policy Choices and Political Motivations*, 5 BRIT. TAX REV. 527, 528 (2005) (explaining the tax issues and the struggle for investment that give rise to tax arbitrage); *see also* Robert J. Peroni et al., *Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income*, 52 SMU L. REV. 455, 476 (1999) (showing how tax havens can negatively affect countries like the United States that have strong tax regimes).

34. *See* Boyle, *supra* note 33 (demonstrating some of the causes of tax arbitrage); *see also* Adam H. Rosenzweig, *Why Are There Tax Havens?,* 52 WM. & MARY L. REV. 923, 930 (2010) (claiming that the policies of tax havens are ultimately bad for their economic growth).

35. *See* Timothy V. Addison, *Shooting Blanks: The War on Tax Havens*, 16 IND. J. GLOBAL LEGAL STUD. 703, 712 (2009) (describing the lax legal framework of a tax haven); *see also* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (implying that the strong bank secrecy laws of tax havens increase cross-border arbitrage).

36. *See* IMF, *Caribbean Offshore Financial Centers: Past, Present, and Possibilities for the Future*, IMF Doc. WP/02/88 at 4 (June 26, 2002) (arguing that offshore financial centers provide critical and legitimate services such as minimizing tax liabilities and protecting assets from political and legal risks). *But see* Thomas C. Pearson, Note, *Proposed International Legal Reforms for Reducing Transfer Manipulation of Intellectual Property*, 40 N.Y.U. J. INT'L L. & POL. 541, 542 (2008) (stating that most Multinational Enterprise Groups "aggressively engage in global strategic tax planning, resulting in some 'abusive tax avoidance'").

37. *See* Jeremiah Coder, *A Cayman Islands–Based Attorney Talks About Offshore Tax Havens*, TAX NOTES, May 2009, at 966 (interviewing Charles Jennings of Maples and Calder); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, LARGE U.S. CORPORATIONS AND FEDERAL CONTRACTORS WITH SUBSIDIARIES IN JURISDICTIONS LISTED AS TAX HAVENS OR FINANCIAL PRIVACY JURISDICTIONS, GAO Doc. No. 09-157, at 1 (2008) (stating that corporate subsidiaries are used for a variety of business reasons and that U.S. taxpayers interpret American tax law in relation to international subsidiaries); *see also* OECD, BEHIND THE CORPORATE VEIL: USING CORPORATE ENTITIES FOR ILLICIT PURPOSES (2001) (addressing the legitimate and illegitimate uses of corporate vehicles); *see also* Jesse Drucker, *Forest Laboratories' Globe-Trotting Profits*, BLOOMBERG BUS. WEEK, May 2010, at 23 (describing the regulatory and enforcement challenges posed by transfer-pricing techniques by corporations).

38. *See* Drucker, *supra* note 37 (demonstrating that companies use offshore subsidiaries to avoid U.S. taxes and facilitate profitable transactions); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37 (listing the U.S. corporations that employ offshore subsidiaries to avoid taxes and facilitate profitable transactions).

tant flows of money, in situations where unnecessary or uncertain tax rules would operate to make the transaction unattractive."[39]

The benefits of having offshore financial centers that can be used for managing inconsistencies and inefficiencies of a tax system is underscored by the fact that a myriad of factors, not all them rational, from political interests to institutional constraints to biases, determine that tax law of a country.[40] Steven A. Dean argues that the model of a philosopher king lies at the core of the power of taxation.[41] That model assumes that governmental decisions on tax policies are rational and aim exclusively for the public good.[42] In fact, a variety of factors from local interests to political biases influence tax policies, not all aiming necessarily for the public good.[43] If the model of the philosopher king does not work within the boundaries of a democratic nation, it would work much less for the coordination of taxation among nations.[44] Nonetheless, international cooperation on tax matters operates under the impetus of the philosopher king model.[45]

In addition, if taking into account the view of some commentators, the benefit of increased capital formation and employment in high-tax jurisdictions outweighs the revenue

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39. *See* Press Release, Allen & Overy, Allen & Overy Insists That Tax Havens Have a Role to Play in International Finance (Mar. 3, 2009) (on file with *PRLog*). *See generally* Frederick J. Tansill, *Asset Protection Trusts (APTS): Non-Tax Issues*, SS020 A.L.I.-A.B.A. 631, § III.A Summary (2010) ("demonstrating" how Singapore's tax regime provides a haven for businesses seeking private banking services and a break from strict tax laws).

40. *See* Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles,* 45 TEX. INT'L L.J. 377, 449–50 (2009) (discussing the benefits of offshore financial centers on the economic development of onshore financial centers); *see also* Sheldon D. Pollack, *Tax Reform: the 1980s in Perspective*, 46 TAX L. REV. 489, 494 (1991) (acknowledging that tax policy making involves political and economic interests that are often contradictory).

41. *See* Steven A. Dean, *Philosopher Kings and International Tax: A new Approach to Tax Havens, Tax Flights, and International Tax Cooperation,* 58 HASTINGS L.J. 911, 911–12 (2007) (explaining that the philosopher king model is more influential on international tax policy then domestic tax policy). *But see* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism,* 98 YALE L.J. 449, 464 (1989) (arguing that in the modern era there is no need for the philosopher king model).

42. *See* Victor Zonana, *International Tax Policy in the New Millennium: Developing an Agenda*, 26 BROOK. J. INT'L L. 1253, 1258 (2001) (affirming that governments often "pursue national tax policies in the interest of funding of public goods and services"); *see also* Jack M. Mintz, *Principal Paper: National Tax Policy and Global Competition*, 26 BROOK. J. INT'L L. 1285, 1285 (2001) (admitting that globalization has undermined the ability of governments to pursue national tax policies that benefit the public good).

43. *See* Dean, *supra* note 41, at 911–13 (recognizing that the internal politics of a nation may cause its government to take actions that have a negative impact on a country's welfare); *see also* Richard J. Kovach, *Taxes, Loopholes and Morals Revisited: A 1963 Perspective on the Tax Gap,* 30 WHITTIER L. REV. 247, 281 n.206 (2008) (concluding that political and personal biases often influence tax policy).

44. *See* Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 TUL. L. REV. 125, 129 (2009) (asserting that the divergent policies among nations cause difficulties in tax harmonization). *See generally* Julie Roin, *Taxation Without Coordination,* 31 J. LEGAL STUD. 61 (2002) (emphasizing the inherent difficulties in coordinating national tax rates).

45. *See* Dean, *supra* note 41, at 912 (stating that international tax policy is influenced by the philosopher king model); *cf.* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION (1980) (identifying constraints on the power to tax and illustrating the notion of a revenue-maximizing government).

losses resulting from the use of offshore financial centers, then the role of offshore financial centers would be rather beneficial for the global economy, instead of harmful.[46] Walid Hejazi's argument, for example, that the Canadian investment in low-tax jurisdictions results only in a Canadian tax revenue loss is a rather simplistic claim, because the Canadian investment "that moves through low-tax jurisdictions results in increased Canadian trade, and consequently increased Canadian capital formation and employment."[47] Similarly, Qing Hong and Michael Smart argue "that the investment-enhancing effects of international tax planning can dominate the revenue-erosion effects."[48] To be sure, even accepting the benefits of using offshore financial centers legitimately, they are associated foremost with illegitimate purposes, such as money laundering, terrorist financing, and tax evasion.[49] The main challenge of curtailing the use of offshore jurisdictions for illegitimate purposes can therefore be resolved—as the new standard of cooperation on tax matters aims—via more transparency and accountability.[50]

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46. *See* Mihir A. Desari et al., *The Demand for Tax Haven Operations,* 90 J. PUB. ECON. 219, 224 (2006) (concluding that "[t]he evidence indicates that American multinational firms establish operations in tax haven countries as part of their international tax avoidance strategies"); *see also* Esther C. Suss et al., *Caribbean Offshore Financial Centers: Past, Present, and Possibilities for the Future*, 7 (Int'l Monetary Fund Research, Working Paper WP/02/88, 2002) (describing the economic benefits gained from the creation of employment in offshore financial centers).

47. *See* Walid Hejazi, *Offshore Financial Centers and the Canadian Economy*, Feb. 2, 2007 (presented at the Barbados International Business Association) http:www.rotman.utoronto.ca/facbios/file/Hejazi%20Barbados%20Study%20Rotman%20Website.pdf; *see also* Jack M. Mintz & Andrey Tarasov, *Canada Is Missing Out on Global Capital Market Integration*, C.D. HOWE INSTITUTE, Aug. 21, 2007, at 3 (illustrating that one of the major benefits of investing abroad are opportunities to expand business in international markets).

48. *See* Qing Hong & Michael Smart, *In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment*, 54 EUR. ECON. REV. 82, 83 (2010) (stating generally that tax havens may have some positive effects); *see also* Mihir A. Desari et al., *Repatriation Taxes and Dividend Distortions*, 54 NAT'L TAX J. 829, 830 (2001) (remarking that "repatriation taxes reduce economic efficiency by creating stronger incentives to remit dividends from some foreign affiliates than they do from others"). *See generally* Ronen Palan, *International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics*, 11 THEORETICAL INQUIRIES IN L. 149, 174 (2010) (showing the connection between the creation of offshore financial centers and the organization of an unregulated financial system, the Euromarkets). It does not follow that the current onshore/offshore relationship and tax strategies do not create inefficiencies.

49. *See* Jane G. Gravelle, *Tax Havens: International Avoidance and Evasion,* CRS REPT. FOR CONGRESS 2 (2009) (indicating that tax "[evasion] is often a problem of lack of information, and remedies may include resources for enforcement, along with incentives and sanctions designed to increase information sharing, and possibly a move towards greater withholding. Avoidance may be more likely to be remedied with changes in the tax code"). *See generally* David Spencer, *Cross-Border Tax Evasion and Bretton Woods II*, 20 J. INT'L TAX 44, 44 (2009) (describing the "growing concerns by governments, international organizations, and civil society about how to confront evasion"); *see also* Bruce Zagaris, *A Brave New World: Recent Developments in Anti–Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters,* 32 VAND. J. TRANSNAT'L L. 1023 (1999) (examining general trends, elements and developments in recent anti-money laundering efforts).

50. *But see* Robert T. Kudrle, *Ending the Tax Haven Scandals*, 9 GLOBAL ECON. J. 1, 2–3 (2009) (arguing that "neither conventional crackdowns on haven abuse by business nor greater transparency to thwart individual evaders will produce satisfactory results. Completely new instruments must be used." Further, "[t]ax-avoiding corporations can be driven out of the tax havens, and bilateral information-sharing agreements will not end evasion. Only a bold, group-up redesign of international taxation can solve the problems.").

Once almost full transparency is in place, the debate can continue whether certain uses are revenue-enhancing, investment-enhancing and beneficial in general.[51]

Pressure for Information Transparency

In international taxation gray is the new black. The OECD Global Forum's progress report on implementing transparency and the exchange of information on tax issues shows no uncooperative jurisdictions.[52] With the removal of Andorra, Liechtenstein, and Monaco from the "blacklist" in June 2009,[53] all jurisdictions have substantially implemented or committed to implementing standards that provide for:

Exchange of information upon request in cases for which it is "foreseeably relevant" to the administration and enforcement of the domestic laws of the treaty partner;[54]

No restrictions on exchange caused by bank secrecy or domestic tax interest requirements;[55]

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51. *See* Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Restrospective After a Decade*, 34 BROOK. J. INT'L L. 783, 787 (2009) (asserting that the OECD's assessment of tax transparency and information exchange was to determine what is necessary for a more level playing field worldwide); *see also* Taylor Morgan Hoffman, Recent Development, *The Future of Offshore Tax Havens*, 2 CHI. J. INT'L L. 511, 513 (2001) (describing how, to remedy what they see as harmful tax practices, the OECD has recommended implementation of its values of transparency, non-discrimination and effective exchange of information).

52. *See* A PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD (2011), http://www.oecd.org/dataoecd/50/0/43606256.pdf (reporting that there are currently no uncooperative jurisdictions); *see also* Aleksandra Bal, *Tax Havens—Dangerous Paradises or Endangered Oases? Evaluation of the Latest Anti–Tax Haven Campaign*, INT'L TAX MGMT., Mar. 21, 2010, at 34 (stating that the four nations that had previously been uncooperative made commitments to share information with the OECD).

53. *See* Ulrika Lomas, *OECD Removes Last Three Jurisdictions From Blacklist*, TAX-NEWS.COM, June 2, 2009, http://www.taxnews.com/asp/story/OECD_Removes_Last_Three_Jurisdictions_From_Blacklist_xxxx37064.html (asserting that the three nations who had been on the "blacklist" were no longer there, and that there are currently no countries in that uncooperative category). Also, the OFC Report changed its title to FSC Report because "[t]he FSC Report, which stands for Financial Services Centres, better represents a world where the distinction between the 'white listed' offshore centres and onshore financial centres has largely disappeared." E-mail from OFC, Important News . . . The OFC Report has been re-branded as The FSC Report (on file with author).

54. *See* OECD, TERMS OF REFERENCE TO MONITOR AND REVIEW PROGRESS TOWARDS TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES 13–14 (2010), www.oecd.org/dataoecd/37/42/44824681.pdf (hereinafter OECD: TERMS OF REFERENCE) (describing the "foreseeable relevance" standard as "all information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties" regarding taxes); *see also* David Spencer, *OECD Model Agreement Is a Major Advance in Information Exchange*, 13 J. INT'L TAX 32, 36 (2002) (indicating that the foreseeable relevance standard is meant to increase the flow of pertinent information between parties and to prevent "fishing expeditions" into the affairs of the other party).

55. *See* OECD: TERMS OF REFERENCE, *supra* note 54, at 9 (explaining that the sharing of information between parties should not be unnecessarily restricted); *see also* Christopher Owen, *Information Thieves Help Catch Tax Evaders*, FINANCIAL NEWS, Jan. 28, 2011, http://www.efinancialnews.com/story/2011-01-28/information-thieves-catch-tax-evaders (demonstrating that one of OECD requirements is not having restrictions on exchange caused either by bank secrecy or domestic tax interest).

Availability of reliable information and powers to obtain it;[56]

Respect for taxpayers' rights;[57]

Strict confidentiality of information exchanged.[58]

The OECD's Harmful Tax Practices Initiative names (and shames) countries with offshore financial centers as tax havens.[59] This initiative was instrumental in bringing about nations' willingness to observe certain standards of transparency and information exchange regarding taxation.[60] Although these standards impose constraints on nations' sovereign power regarding taxation, membership in the OECD was secondary.[61] Once the OECD member countries decided that information exchange on tax matters would be the advisable global stan-

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56. *See* OECD: BRIEF 7 (Feb. 11, 2011) (outlining the 10 essential elements of transparency and exchange of information for tax purposes); *see also* Avi-Yonah, *supra* note 51, at 784 (noting that the OECD report in 2000 stated that all OECD countries should "permit tax authorities to have access to bank information, directly or indirectly, for all tax purposes so tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchange of information").

57. *See* Simon James et al., *The Taxpayers' Charter: A Case Study in Tax Administration* 4 (Centre for Tax System Integrity, Working Paper 62, 2005) (noting that the OECD recognized in 1990 a range of taxpayer rights, including the right to be informed). *But see* George M. Melo, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty (A Critique of the OECD's Report: Harmful Tax Competition: An Emerging Global Issue*), 12 PACE INT'L L. REV. 183, 188 (2000) (arguing that taxation is a sovereign right and when jurisdictions expand activities across national borders, they subject themselves to double taxation).

58. *See* OECD: BRIEF 5 (June 3, 2010) (describing the peer review process in which the OECD members will review those nations in the OECD and those they have identified as tax havens); *see also* OECD, OVERVIEW OF THE OECD'S WORK ON COUNTERING INTERNATIONAL TAX EVASION, A BACKGROUND INFO. BRIEF 3–4, (Sept. 21, 2009) (describing the standards set forth by the OECD). *See, e.g.,* Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. 605 (2008) (suggesting that the United States should aim to create a more complete market for extraterritorial tax information).

59. *See* OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998) (providing analytical framework for identifying the jurisdictions that engage in harmful tax practices); *see also* Maria Flavia Ambrosanio & Maria Serena Caroppo, *Eliminating Harmful Tax Practices in Tax Havens: Defensive Measures by Major EU Countries and Tax Haven Reforms*, 53 CAN. TAX J. 685, 688 (2005) (noting that jurisdictions are pushed to cooperate when identified as tax havens).

60. *See* Jeffrey Owens, *OECD Harmful Tax Practices Initiative: Progress Made, in* THE OFC REPORT, at 15 (2009); *see also* U.S. Department of the Treasury, *Statement of Paul H. O'Neill Before the Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations OECD Harmful Tax Practices Initiatives*, PO-486 (July 18, 2001) (commenting that the OECD initiative would strengthen the enforcement of U.S. tax laws "if it [OECD initiative] is focused on its core element: the need for countries to be able to obtain specific information from other countries upon request in order to prevent noncompliance with their tax laws").

61. *See* MARK PIETH, INTERNATIONAL STANDARDS AGAINST MONEY LAUNDERING, IN A COMPARATIVE GUIDE TO ANTI-MONEY LAUNDERING: A CRITICAL ANALYSIS OF SYSTEMS IN SINGAPORE, SWITZERLAND, THE UK AND THE USA 19–22 (Mark Pieth & Gemma Aiolfi, eds., 2004) (commenting on the issues of securing implementation within the club and with non-members of the FATF, he indicates that "in what was an unprecedented move, the FATF chose to go beyond its original mandate to assess its own members and in 1998 it initiated the process to identify Non-Cooperative Countries and Territories (NCCTs)").

dard,[62] non-OECD countries were left with the option of either adopting the standards or becoming financial pariahs in the international community.[63] This is not to say that tax policies of tax havens aiming to facilitate tax evasion that should be levied by other countries can also be seen as "thwarting the[ir] sovereign fiscal choices."[64] But, to be sure, the OECD initiative has undoubtedly moved from imposition to participation,[65] albeit as an afterthought.[66] Since 2000, both OECD and non-OECD countries worked together on tax matters within the Global Forum framework on Transparency and Exchange of Information for Tax Purposes.[67]

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62. *See* Ambrosanio & Caroppo, *supra* note 59, at 691 (noting that under the transparency requirements, jurisdictions ensured that information would be given to tax authorities of other countries in response to a specific request). *See generally Towards Global Tax Cooperation: Progress in Identifying and Eliminating Harmful Tax Practices* (Paris, OECD, 2000) (recommending that in order to counteract harmful tax practices in havens there should be improvements in domestic legislation, bilateral agreements, and international cooperation).

63. *See* Robert T. Kudree & Lorraine Eden, *The Campaign Against Tax Havens: Will It Last? Will It Work?*, 9 STAN. J.L. BUS. & FIN. 37, 51 (2003) (demonstrating that increased globalization, as seen through the unification of Europe, the end of the Cold War, the war on drugs, and the role of electronic commerce, have led to a more united fight against tax regimes and tax havens). *But see* George M. Melo, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty (A Critique of the OECD's Report: Harmful Tax Competition: An Emerging Global Issue*), 12 PACE INT'L L. REV. 183, 201–02 (2000) (noting that areas designated as tax havens may choose not to cooperate simply because entering into such a treaty would not be beneficial to them).

64. *See* George M. von Furstenberg, *The Economics of Offshore Financial Services and the Choice of Tax, Currency, and Exchange Rate Regimes*, 19 J. FIN. TRANSFORMATION 49, 56 (2007), *available at* http://ssrn.com/abstract=925885 (reiterating the OECD's characterization of tax havens in its 2008 meeting to discuss reformation of its policies); *see also* Diane M. Ring, *What's at Stake in the Sovereignty Debate? International Tax and the Nation-State*, 49 VA. J. INT'L L. 157, 157 (2008) (commenting that "[s]overeignty takes center stage in international tax because much of the debate over both rules and policies involves and impacts other nations. . . . Even purely domestic actions can have significant ramifications abroad. Moreover, much effective tax policy implementation requires the interaction–even cooperation–of two or more nations.").

65. *See* Gregory Rawlings, *Responsive Regulation, Multilateralism, Bilateral Tax Treaties, and the Continuing Appeal of Offshore Finance Centres* 5 (Australian Nat'l Univ. Centre for Tax System Integrity, Working Paper No. 74, 2005), http://ctsi.anu.edu.au/publications/WP/74.pdf (commenting that "[t]he OECD has moved away from a command and control regulatory style to one involving dialogue, with prospects for coercion moved into the background"); *see also* Ming-Sung Kuo, *(Dis)Embodiments of Constitutional Authorship: Global Tax Competition and the Crisis of Constitutional Democracy*, 41 GEO. WASH. INT'L L. REV. 181, 201 (2009) (explaining that the OECD's goal is to encourage dialogue between member countries and nonmember governments to promote transparency in tax policies).

66. *See* JASON CAMPBELL SHARMAN, HAVENS IN STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 74–75 (2006) (saying that the OECD initiative moved from "exclusionary" or "top-down" to more participatory when non-OECD members were included in the "standard-setting and procedural questions on an equal basis with OECD members. Decisions were made only by consensus, and threats of sanctions for non compliance were dropped."); Sharman concludes that "[t]he exclusionary and coercive approach that had set the project to regulate harmful tax competition apart from the standard procedures of international organizations, intended as a prototype for future regulatory campaigns, had failed and had been repudiated." (75); *see also* Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C.L. REV. 501, 538 (2010) (describing the OECD's efforts in the early 2000s to include more jurisdictions in the decision-making process).

67. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, http://www.oecd.org/site/0,3407,en_21571361_43854757_1_1_1_1_1,00.html (describing the Global Forum's goal of increasing transparency and the exchange of information); *see also* Akiko Hishikawa, Note, *The Death of Tax Havens?*, 25 B.C. INT'L & COMP. L. REV. 389, 411–12 (2002) (tracing the growth of the Global Forum from its inception in 2000 toward its goal to eliminate harmful tax practices by 2005).

United by "the need of governments to protect their tax bases from non-compliance with their tax laws,"[68] participants in the Global Forum know that for effective and long-lasting implementation and compliance on international tax matters, it is necessary "to expand membership and ensure its members participate on an equal footing."[69]

Blacklist Consequences

To be listed as an uncooperative country tarnishes the reputation of the financial sector of that country.[70] Based on a blacklisting, other countries may be justified in adopting unilateral measures to enforce their respective tax laws vis-à-vis uncooperative countries.[71] For instance, Senator Carl Levin of Michigan proposed the Stop Tax Haven Abuse Act to end tax shelter abuses.[72] This bill sought amendments to the Internal Revenue Code[73] in order to, *inter alia*, establish rebuttable presumptions of control to determine or collect taxes from a U.S. person

68. *See* OECD, ABOUT THE GLOBAL FORUM, http://www.oecd.org/document/33/0,3746,en_21571361_43854757_44200609_1_1_1_1,00.html (outlining the goals and objectives of the 2009 Global Forum in Mexico). *See generally* Erika G. Litvak, *Selected Update on Tax Information Exchange Agreements in Latina America*, 16 LAW & BUS. REV. AM. 335, 343 (2010) (establishing that Mexico hosted the fifth Global Forum in 2009 to discuss "the next steps in a global campaign to improve transparency and exchange of banking, ownership, and other information for tax purposes").

69. *See* OECD, SUMMARY OF OUTCOMES OF THE MEETING OF THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES HELD IN MEXICO ON 1-2 SEPTEMBER 2009 at 1, http://www.oecd.org/dataoecd/44/3 9/43610626.pdf (describing the OECD's main goals for its meeting in Mexico). *See generally* Bruno Gurtner, *Tax Evasion: Hidden Billions for Development*, SOCIAL WATCH REPORT 24, 24–25 (2004), *available at* http://unpan1.un.org/intra doc/groups/public/documents/apcity/unpan018181.pdf (saying that all countries suffer by a diminished tax collection when transnational corporations and wealthy individuals take advantage of tax havens and low tax jurisdictions).

70. *See* Robert T. Kudrle, *Tax Haven Vulnerability to Reputational Attack: What Do the Data Show?*, Prepared for the Second Meeting of the World International Studies Committees, Ljubljana, Slovenia July 23–26, 2008 at 15–16, http://www.wiscnetwork.org/ljubljana2008/getpaper.php?id=284 (showing that to be solely blacklisted does not necessarily affect "the volume of banking system-related tax haven fortunes. But the authors warns that from this data does not follow that "the fear of the impact of blacklisting on capital flight may not have provided part of the impetus for the early acceptance of OECD or FATF prescriptions or the willingness of some jurisdictions to cooperate later on").

71. *See* Mario Giovanoli, *The Reform of the International Financial Architecture After the Global Crisis*, 42 N.Y.U. J. INT'L L. & POL. 81, 121 (2009) (establishing that countries that have been blacklisted under OECD regulations, among others, can be subjected to unilateral or multilateral sanctions); *see also* MARKUS MEINZER, UNILATERAL MEASURES AGAINST OFFSHORE TAX EVASION 14–15 (2008) (describing unilateral actions by Argentina against offshore tax havens and the potential for similar actions by the United States).

72. *See* Stop Tax Haven Abuse Act, § 681, 111th Cong. Section 7492, Subchapter F (as introduced by Senator Levin, March 2, 2009); *see also International Initiatives Relating to Offshore Financial Centers*, 1 ABA INT'L FIN. PROD. & SERVICES 2–5 (Aug. 2009), http://meetings.abanet.org/webupload/commupload/IC727000/newsletterpubs/Financial.Products.Newsletter-8.2009.pdf (providing an overview of the European and American initiatives for promoting transparency and information exchange on offshore financial centers. Among others, OECD initiative, British offshore financial centres report by Michael Foot, The Turner Report on Regulation, European Union Savings Directive II, Stop Tax Haven Abuse Act, Baucus Offshore Tax Evasion Draft Legislation); *see also* HM Treasury, independent reviews, British Offshore Financial centres, *Final report published* (Oct. 29, 2009), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www. hmtreasury. gov.uk/indreview_brit_offshore_fin_centres.htm (announcing Michael Foot's final report re: overseas terri-tories was published).

73. *See* Stop Tax Haven Abuse Act, *supra* note 72 (proclaiming that the provisions of the Act will amend the Internal Revenue Code).

receiving, transferring, or being a beneficiary of an entity "formed, domiciled, or operating in an offshore secrecy jurisdiction."[74] If a U.S. citizen receives anything of value from an offshore secrecy jurisdiction, it is to be presumed part of his or her taxable income.[75] The bill, which never became law,[76] also would had allowed more time for investigation of tax issues involving offshore secrecy jurisdictions[77] and provides for a list of offshore secrecy jurisdictions that is to be updated by the secretary of the treasury.[78]

Similarly, the president of Ecuador issued Executive Decree 1793, indicating that bidders in public bids with one or more shareholders or participants of companies domiciled in tax havens would be subject to grounds for disqualification on such public bids.[79] The Internal Revenue Service of Ecuador determines which jurisdictions are tax havens and may base these determinations on information provided by the OECD and GAFI.[80] In addition, Brazil, since 1996, adopted Law No. 9.430 of December 27, involving the notion of tax haven jurisdiction ("favored taxation country" or "pais com tributação favorecida") aiming to curtail tax haven abuses.[81] Some of the measures against tax havens are defined as "any country that does not

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74. *See id.*; *see also* Maria Tihin, *The Trouble With Tax Havens: The Need for New Legislation in Combating the Use of Offshore Trusts in Abusive Tax Shelters*, 41 COLUM. J.L. & SOC. PROBS. 417, 433 (2008) (listing the proposed advantages to the Act, including factors that might deter abusers from abusing tax havens).

75. *See* Stop Tax Haven Abuse Act, *supra* note 72 (declaring that anything of value is to be presumed part of a person's taxable income); *see also* Niels Jense, Note, *How to Kill the Scapegoat: Addressing Offshore Tax Evasion With a Special View to Switzerland*, 63 VAND. L. REV. 1823, 1846 (2010) (clarifying that anything of value will be part of taxable income).

76. *See* Bryan S. Arce, Note, *Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded U.S. Taxes*, 34 BROOK. J. INT'L L. 465, 486 (2009) (speculating that the bill does not have enough backing to become law); *see also* Stop Tax Haven Abuse Act, *supra* note 72, at § 681 (stating that the bill never became law).

77. *See* Stop Tax Haven Abuse Act, *supra* note 72 (allowing more time for investigations); *see also* Tihin, *supra* note 74 (explaining that two of the main purposes of the bill are to increase disclosure and allow more time for investigation).

78. *See* Arce, *supra* note 76, at 482 n. 139 (noting that the secretary of treasury has a list of countries identified as tax havens). *See generally* Raymond Baker et al., *Tax Evasion and Incorporation Transparency: Show U.S. the Money*, Congressional briefing, July 24, 2009, http://www.taxjustice.net/cms/upload/pdf/TJNUSA_090724_Hill_briefing.pdf (explaining the urgency and advantages of anti–tax haven bills pending in Congress).

79. *See* U.S. Commercial Service, *Doing Business in Ecuador, 2010: Country Commercial Guide for U.S. Companies (2010)*, www.buyusa.gov/northcarolina/661.pdf (explaining that any public bidders who are domiciled in tax havens are immediately disqualified from Ecuadorian projects); *see also* Press Release, Inter American Press Association, IAPA Disappointed at Retaliatory Position Assumed by Ecuadorian President Rafael Correa (June 25, 2009),http://www.sipiapa.org/v4/index.php?page=cont_comunicados&seccion=detalles&id=4207&idoma=us (detailing the attacks leveled by the media against President Correa's Decreto 1793).

80. *See* Decreto No. 1793, Jun. 20, 2009; Decreto No. 144, Nov. 19, 2009 (modifying Decreto 1793); and Resolution No. NAC-DGER 2008-0182, Feb. 29, 2008.

81. *See* Lei No. 9.430, de 27 de dezembro de 1996, D.O.U. de 30.12.1996. (Brazil) (codifying the initial definition of favored taxation countries); *see also* DENNIS CAMPBELL, LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA 222–23 (Christian Campbell ed., Yorkhill Law Publishing 2008) (reporting that Brazil implemented regulations to reduce the effect of foreign favorable tax environments).

impose tax on income or, when imposed, is a low-tax country, in which the applicable income tax rate is equivalent to any percentage varying between zero and 20% (maximum)."[82] Also, *inter alia*, it "increased the withholding income tax rate due by non-residents domiciled in tax haven countries from 15% (the basic rate) to 25% . . . [creating] an adverse tax regime discriminating investments originated from tax haven countries."[83] From time to time, the Secretaria Da Receita Federal Do Brasil modifies, as with the Instrução Normativa SRF No. 1 of June 4, 2010, the list of countries with "Países com Tributação Favorecida" e relaciona "Regimes Fiscais Privilegiados" de 6 de agosto de 2002.[84]

An example of a political initiative against the use of tax havens was the Motion for Resolution in the European Parliament by Daniel Cohn-Bendit, Monica Frassoni, and Pierre Jonckheer on behalf of the Verts/ALE Group.[85] This resolution states that tax havens and non-cooperative jurisdictions are loci for tax evasion and calls for a global system of cooperation and information exchange on tax issues.[86] The resolution finds it paramount "to put an end to the use of artificial legal persons as a way of avoiding taxation; [it] stresses also that in the place of banking secrecy, automatic information exchange should prevail in all circumstances and in all EU countries [and] dependent territories."[87] The Resolution "calls on the EU to take action to eradicate tax havens, tax evasion and illicit capital flight from developing countries; [it] calls,

82. *See* Lei No. 11.727, de 23 de junho de 2008, D.O.U. de 24.06.2008 (Brazil) (amending the definition of favored taxation countries in Lei No. 9.430 art. 24 to include taxation percentage); *see also* Walter Stuber & Adriana Maria Gödel Stuber, *Brazil: The Development of the Definition of Tax Haven in Brazil*, MONDAQ, Jan. 19, 2010, http://www.mondaq.com/article.asp?articleid=88194 (discussing the evolution of the legal definition of tax haven jurisdiction in Brazil).

83. *See* Stuber & Stuber, *supra* note 82 (detailing the increased withholding tax assessed against non-residents domiciled in tax haven countries); *see also* KPMG Tax Advisors—Assessores Tributários Ltda., *Legal Definition of Tax Havens in Brazil Is Changed,* July 2008, http://www.kpmg.com.br/publicacoes/tax/InternationalTax_Brazil_julho_08.pdf (acknowledging the change in withholding tax but raising doubt as to the applicability to transfer pricing).

84. "Países incluídos ficam submetidos à legislação de controle de preços de transferência para as operações efetuada com pessoas física ou jurídica residentes ou domiciliadas no Brasil, independente de haver vinculação." Fazenda, Noticias, *Receita publica lista de "Países com Tributação Favorecida" e relaciona "Regimes Fiscais Privilegiados,"* June 8, 2010, http://www.fazenda.gov.br/portugues/releases/2010/junho/r080610b.asp (announcing the publication of an updated list of countries with favorable tax treatment); *see also* Instrução Normativa RFB No. 1.037, de 4 de junho de 2010, D.O.U. de 7.6.2010. (Brazil) (providing the list of countries with favorable tax treatment; *see also* Fraga, Bekierman & Pacheco Neto Advogados, *Brazil Expands Its Blacklist of Tax Havens*, http://www.fblaw.com.br/lang_ingles/artigos/brazil_expands_its_blacklist_of_tax_havens.php.

85. *See* EUR. PARL. DOC. B6 0186 (2009) (criticizing tax havens and proposing regulation of offshore tax evasion centers). *But see* EUR. PARL. DOC. P6_TA 0330 (2009) (opting not to incorporate the complete proposal from EUR. PARL. DOC. B6 0186 (2009) and delaying resolution until the subsequent G20 meeting).

86. *See* EUR. PARL. DOC. B6 0186 (2009) (emphasizing "the need for a global system of cooperation and information exchange in tax matters"); *see also* EUR. PARL. DOC. P6_TA 0330 (2009) (insisting on the need for information sharing among nations).

87. *See* EUR. PARL. DOC. B6 0186 (2009) (requesting the cessation of artificial legal persons as a means of avoiding taxation). *But see* EUR. PARL. DOC. P6_TA 0330 (2009) (omitting mention of regulation of artificial legal persons).

therefore, for a new binding global agreement which will force transnational corporations automatically to disclose their profits and taxes paid in all developing countries where they operate."[88]

Implementing Transparency

For countries with offshore financial centers, one of the most urgent tasks is how to implement standards of transparency on tax issues.[89] This implies that a country may have to derogate or modify its laws and regulations and eradicate governmental or business practices which hinder access to information as to beneficial ownership and other relevant financial information of U.S. citizens.[90] It would also imply that a country must commit to the adoption of at least 12 TIEAs.[91] For the proposed Stop Tax Haven Abuse Act, for example, a jurisdiction would not be considered an offshore secrecy jurisdiction if the U.S. Secretary of Treasury determines that a jurisdiction has a treaty or other information exchange agreement with the United States allowing prompt and obligatory exchanging of foreseeably relevant information to achieve the goals of the Stop Tax Haven Abuse Act.[92] A jurisdiction was not considered an offshore secrecy jurisdiction if in the 12 months prior to the determination, the information exchange was satisfactory or an intergovernmental group or organization, of which the United States is a member, did not identify the jurisdiction in question as uncooperative with interna-

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88. *See* EUR. PARL. DOC. B6 0186 (2009) (requesting expanded territorial scope of regulation in excess of Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, 2003 O.J. (L 157) 38).

89. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm. of Experts on Int'l Cooperation in Tax Matters, Report on the fifth session, U.N. Doc. E/2009/45 (SUPP) (Oct. 23, 2009) (proposing a code of conduct that states may implement to cooperate with combating international tax evasion). *But see* Jaclyn H. Schottenstein, Note, *Is Bank Secrecy Still Bankable?: A Critical Review of Bank Secrecy Law, Tax Evasion and UBS*, 5 ENTREPRENEURIAL BUS. L.J. 351, 367 (2010) (recognizing that transparency requirements have been modified to decrease the number of blacklisted states).

90. *See* Erika Lityak, *Selected Update on Tax Information Exchange Agreements in Latin America*, 16 L. & BUS. REV. AM. 335, 348 (2010) (acknowledging that many Latin American countries entered into more tax information exchange agreements to increase transparency and relieve international pressure); *see also* Matthew Saltmarsh, *Tax Havens Likely to Be Target of G-20 Nations*, N.Y. TIMES, Mar. 12, 2009 (reporting that Liechtenstein has agreed to accept the OECD's standards on transparency and information exchange as a result of international pressure).

91. *See* Angel Gurria, Remarks at the Moving Forward on the Global Transparency and Tax Information Exchange Meeting (June 23, 2009) (transcript available on the OECD website) (recognizing that while signing 12 agreements indicates progress, countries should aim to sign many more); *see also* OECD, *Peer Review Reports on Exch. of Info.*, The Global Forum on Transparency and Exch. of Info. for Tax Purposes, 31, Feb. 11, 2011(asserting jurisdictions that have signed 12 or more tax agreements are considered to have satisfied the internationally agreed minimum tax standard).

92. *See* Niels Jense, *How to Kill the Scapegoat: Addressing Offshore Tax Evasion With a Special View to Switzerland*, 63 VAND. L. REV. 1823, 1845 (2010) (explaining that countries that demonstrate rules and practices conducive to the exchange of information will not be "blacklisted"); *see also* Press Release, Carl Levin, U.S. Senator, Summary of the Stop Tax Haven Abuse Act (Mar. 2, 2009) (providing that the secretary of the treasury has the authority to deem countries as "offshore secrecy jurisdiction[s]" upon finding their practices impede the United States from obtaining taxes).

tional tax enforcement or information exchange, and the United States agrees with this determination.[93] To bolster the emphasis on taxation transparency issues, the IRS, the Department of the Treasury, and the Department of Justice are making disclosures of offshore financial accounts of U.S. persons a top priority.[94]

Virtually all offshore financial centers have adopted legislation and certain practices to counter money laundering and financing terrorism.[95] Among these are improvements in customer due diligence, record keeping, and the reporting of suspicious transactions.[96] The majority of offshore financial centers agree to exchange tax information through Bilateral Tax Treaties or Tax Information Exchange Agreements,[97] and the remaining countries are committed to

93. *See* Anthony Todero, *The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem*, 19 MINN. J. INT'L L. 241, 264 (2010) (stating that the secretary of state classifies countries that are uncooperative with international tax enforcement efforts as offshore secrecy jurisdictions). *See generally* Arthur Mann & Robert Cudd, *Stop Tax Haven Abuse Act—Tax Provisions of Interest to Private Funds and Fund Managers*, MORRISON FOERSTER (Mar. 13, 2009), http://www.mofo.com/stop-tax-haven-abuse-act—tax-provisions-of-interest-to-private-funds-and-fund-managers-03-13-2009 (summarizing the Stop Tax Haven Abuse Act).

94. *See* Philip Alexander, *The Long Arm of U.S. Law Reaches for Overseas Assets*, THE BANKER, March 31, 2010; *see also* Lynnley Browning, *UBS and U.S. Given Time to Seek a Settlement*, N.Y. TIMES, July 14, 2009 (reporting Swiss bank UBS being sued by the IRS, forcing it to disclose the names of American clients suspected of tax evasion); *see also* Eliane Engeler, *Swiss Parliament Approves U.S. Tax Deal on 2nd Try*, ABC News, June 15, 2010 (commenting on the U.S.-Swiss treaty providing the United States with the names of thousands of tax evaders); *see also* Richard C. Morais, *The Hot Tax Haven*, FORBES, July 15, 2009 (noting the pressure applied on offshore financial centers to disclose tax information to the United States); *see also* Laura Saunders, *Getting Out of Dodge: The IRS and Offshore Accounts*, WALL ST. J., June 26, 2010 in Personal Finance (describing Switzerland's historic agreement to release the names of suspected tax evaders); *see also* Laura Sanders, *IRS Gets Tougher on Offshore Tax Evaders*, WALL ST. J., July 20, 2009 (establishing that the IRS is stepping up its efforts to obtain information about Americans who hold offshore accounts); *see also* IRS, *Agreement Between the United States of America and the Swiss Confederation on the Request for Info. from the International Revenue Service of the United States of America*, http://www.irs.gov/pub/irs-drop/us-swiss_government_agree ment.pdf (stating that the United States is making offshore accounts and the enforcement of tax laws a priority); *see also* Offshore Alert, *As Offshore Financial Centers Capitulate to US Pressure, First Steps Are "Crucial" to a Successful Tax Evasion Defense, Says Top Attorney*, http://www.offshorealertconference.com/OAC2009/As-offshore-financial-centers-capitulate-to-US-pressure-first-steps-are-crucial-to-a-successful-tax-evasion-defense-says-top-attorney.asp (presenting the U.S.-Swiss agreement that allows the IRS to make tax information requests to a Swiss corporation).

95. *See* VAUMINI AMIN, OFFSHORE LENDING AND FINANCING 254 (Paul B. Sugden ed., 1998) (recognizing the Cayman Islands as an offshore financial center that has implemented all recommendations of the Caribbean Financial Action Task Force to prevent money laundering); *see also* Alison Bachus, *From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering After September 11, 2001*, 21 ARIZ. J. INT'L & COMP. L. 835, 865 (2004) (noting the enactment and implementation of laws by the Cayman Islands to prevent money laundering through its financial institutions).

96. *See* FINANCIAL ACTION TASK FORCE [FATF], Annual Review of Non-Cooperative Countries and Territories 2006–7: Eighth NCCT Review, Oct. 12, 2007 (explaining that the FATF establishes the international anti-money laundering standards); *see also* FATF-GAFI, Non-Cooperative Countries and Territories, http://www.fatf-gafi.org/document/4/0,3343,en_32250379_32236992_33916420_1_1_1_1,00.html (claiming that as of October 13, 2006, there are no non-cooperative countries or territories).

97. *See* FREDERIC FEYTEN & CHOKRI BOUZIDI, TAX LAW CLIENT STRATEGIES IN THE EU: LEADING LAWYERS ON RESPONDING TO RECENT LEGAL DEVELOPMENTS, MANAGING CLIENT EXPECTATIONS, AND NAVIGATING REGIONAL TAX ISSUES AND CHALLENGES 3 (Aspatore Books 2009) (illustrating Luxembourg's initiative to exchange tax information with several European countries); *see also* Bruce Zagaris, *Ethical Issues in Offshore Planning*, SP017 ALI-ABA 365 (2008) (showing the significant number of tax information exchange agreements among members of the Organization for Economic Cooperation and Development).

doing so under increased international pressure.[98] To remain competitive in financial operations, countries are adopting and implementing the international standard for tax information exchange, and multi-nationals are well advised to carefully analyze the tax implications of their cross-border transactions.[99]

How this standard emerged is unsurprising. In general terms, there is a pattern in how coordinating standards started, which naturally begins with identifying an issue.[100] This requires coordination among states, attempting bilateral and ad hoc solutions at first, until a multilateral solution appears.[101] This was the case in varying degrees of effectiveness among a variety of other areas. In international postal communications, there was an evolution of international postal communications governed initially by bilateral agreements,[102] which resulted in a highly inefficient system hindering international trade[103] until the Treaty of Berne of 1874 set

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98. *See* OECD, FIGHTING TAX EVASION, http://www.oecd.org/document/21/0,3343,en_2649_34487_42344853_1_1_1_1,00.html (noting that tax evasion has been a focal point at recent G-20 Summits); *see also* OECD, COUNTERING OFFSHORE TAX EVASION, SOME QUESTIONS AND ANSWERS ON THE PROJECT, http://www.oecd.org/dataoecd/23/13/42469606.pdf, Apr. 21, 2009 (explaining that presently all OECD countries accept the Article 26 standard); *see also* Georges A. Cavalier, *Tax Havens and Public International Law*: *The Case of the Netherlands Antilles* (Mar. 23, 2005) (Ph.D. dissertation, University of Geneva, on file with the author) (discussing the Netherlands Antilles' commitment to remove harmful tax practices to avoid international consequences); *see also* Jonathan Kent, *Canada TEIA Spin-off Could Boost Business*, THE ROYAL GAZETTE, May 7, 2009 (commenting that the TIEA between Bermuda and Canada gives Canadian subsidiaries with residence in Bermuda the right to repatriate profits to their Canadian parents without being taxed in Canada); *see also* Confidentiality of Tax Havens: Info. Exch., OFFSHORE ADVISOR (Nov. 8, 2010), http://www.isla offshore.com/going-offshore/tax-havens-information-exchange (remarking that nearly all tax havens have committed themselves to the internationally agreed-upon tax standard as a result of the OECD's efforts).

99. *See* Pricewaterhouse Coopers, Hong Kong Tax News Flash, Issue 3, Mar. 2009, *available at* http://www.pwccn.com/home/printeng/hktax_news_mar2009_3.html (recommending that multi-nationals reexamine the tax implications of cross-border business transactions in a regulatory environment that facilitates the international exchange of information). *See generally* Jena McGregor, *U.S. Companies Seek New Tax Havens: Anticipating U.S. Tax-Law Changes for Bermuda and Other Standbys, Tyco and Ingersoll-Rand are among the corporations looking at Switzerland or Ireland*, BUSINESS WEEK, June 28, 2009 (stating that "at least half-dozen major corporations . . . have proposed reincorporating in Ireland or Switzerland").

100. *See* Reuvan S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TAX L. REV. 1301, 1304 (1996) (identifying that there is a standard, arising from a common issue, for the structure of international tax law); *see also* Allison Christians, *Taxation as a Global Socio-Legal Phenomenon*, 14 ILSA J. INT'L & COMP. L. 303, 304 (2008) (exploring the common thread that increases the understanding of international tax law).

101. *See* Avi-Yonah, *supra* note 100, at 1305 (establishing multilateral action as an important course toward issue resolution). *See generally* MALHERBE, TAX AMNESTIES, 10 (Kluwer Law International, 2011) (acknowledging the necessity of an international standard).

102. *See* DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA 620 (2008) (examining the history of numerous bilateral agreements in postal communications and noting the existence of 19 by 1903); *see also* ARMAND MATTELART, THE INVENTION OF COMMUNICATION 125 (1996) (declaring historical postal treaties were traditionally governed by bilateral treaties).

103. *See* LINDEN A. MANDER, FOUNDATIONS IN MODERN WORLD SOCIETY 526 (1947) (declaring that bilateral agreements relating to postal communication worked only to hinder international trade). *See generally* PAUL R. KLEINDORFER, EMERGING COMPETITION IN POSTAL AND DELIVERY SERVICES 10 (Springer 1999) (detailing the hindrances of bilateral agreements).

forth the basis for the Universal Postal Union.[104] In maritime commerce, the rise of European Imperialism brought claims of national ownership of areas of the ocean,[105] while the Dutch affirmed the principle of freedom of the seas.[106] In the end, the freedom of the seas became the universal principle around which competing sovereign claims are organized through customary international norms.[107] During the period of nuclear testing, from 1945, when the United States first tested a nuclear bomb in Alamogordo,[108] until 1996, when the Comprehensive Nuclear-Test-Ban Treaty banned all nuclear explosions on Earth whether for military or for peaceful purposes,[109] more than 2,000 nuclear tests were conducted.[110] Nuclear testing created devastating and long-lasting damage to the environment and to people, and countries realized

104. *See* Mira Burri-Nenova, International Regulation of Postal Communications, Pre-publication version, Jan. 2008, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 2 (Wolfrum Rüdiger ed., 2009), *available at* http://papers.rsrn.com/sol3/papers.cfm?abstract_id=1271786 (stating that in 1948, the Universal Postal Union became a specialized agency of the United Nations); *see also* Universal Postal Union, What Is the UPU's Relationship With the United Nations and Other International Organizations? http://www.upu.int/faq/enupuwhat_is_the_upus_relationship_with_the_united_nations_and_other_international_organizations.html.

105. *See* SCOTT GERAL BORGERSON, COUNCIL ON FOREIGN RELATIONS, THE NATIONAL INTEREST AND THE LAW OF THE SEA 6 (Council on Foreign Relations, 2009) (reviewing the concept of European Imperialism, and western Europe's notion of ownership of the sea); *see also* Nicholas J. Lund, *Renewable Energy as a Catalyst for Changes to the High Seas Regime*, 15 OCEAN & COASTAL L. J. 95, 103 (2010) (naming western European countries, such as Portugal and Britain, as two countries that perpetuated the idea of closed seas).

106. *See* JON M. VAN DYKE, FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 6 (Island Press 1993) (reviewing the Dutch notion of Freedom of the seas); *see also* Lund, *supra* note 105, at 103 (explaining the Dutch notion of open seas and Grotius's idea of fairness).

107. *See* Scott G. Borgerson, *The National Interest and the Law of Sea*, COUNCIL SPECIAL REPORT No. 46, May 2009, at 7 (highlighting how the notion of freedom of the seas has become the international norm). *See generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (detailing how freedom of the sea is the international standard through international norms).

108. *See* Jonathan Granoff, *Nuclear Weapons, Ethics, Morals, and Law*, 2000 BYU L. REV. 1413, 1413 (2000) (asserting that the nuclear weapons age began July 16, 1945, when the first atom bomb was tested in the Alamogordo bombing range in New Mexico); *see also* David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT'L L. & POL. 1007, 1010 (2007) (stating that the United States conducted its first nuclear test detonation on July 16, 1945, near Alamogordo, New Mexico).

109. *See* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law,* 92 AM. J. INT'L L. 44, 59 (1998) (noting that the Comprehensive Nuclear Test-Ban Treaty (CTBT) was opened for signature and signed by the United States in New York on September 24, 1996. Its purpose was to ban all nuclear weapon test explosions, and any other nuclear explosions, wherever they might be carried out); *see also* Kesav Murthy Wable, *The U.S.-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime*, 33 BROOK. J. INT'L L. 719, 744 (2008) (stating that the CTBT opened for signature on September 24, 1996).

110. *See* Sergio Duarte, *The Future of the Comprehensive Nuclear-Test-Ban Treaty; Report,* UN CHRONICLE, Mar. 1, 2009, at 30(6) (claiming that in the decades following the first nuclear test, more than 2,000 such tests occurred); *see also* Angelique R. Kuchta, *A Closer Look: The U.S. Senate's Failure to Ratify the Comprehensive Test Ban Treaty*, 19 DICK. J. INT'L L. 333, 338 (2001) (stating that since the day of the first nuclear weapons explosion in July 1945 to the signing date of the CTBT, more than 2,000 test explosions have been registered).

that an international regime for banning nuclear testing was needed.[111] Similarly, governments realized that curtailing tax evasion, conducted through offshore financial centers, evidently requires an international solution and global coordination on transparency aspects of taxation, which became the expected international standard.[112]

Cross-Border Coordination of Information Sharing

The OECD's Harmful Tax Initiative, like an anti-money-laundering initiative as well, involves the question of how to effectively share information among relevant governmental agencies.[113] For this purpose, harmonization of laws, regulations, and practices, as well as bilateral and multilateral international agreements, are crucial.[114] Coordination of tax issues became a vital piece of future global governance.[115] When the issue of humanitarian intervention was debated in which the notion of sovereignty was emphasized as a duty and more than a

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111. *See* Comprehensive Nuclear-Test-Ban Treaty Org. [CTBTO], *World Overview*, http://www.ctbto.org/nuclear-testing/history-of-nuclear-testing/world-overview/page-1-world-overview; *see also* CTBTO, *Nuclear Test Ban Contributes to Protection of Environment*, http://www.ctbto.org/press-centre/highlights/2008/nuclear-test-ban-contributes-to-protection-of-environment (stating that since the CTBT has been opened for signature, only "half a dozen nuclear tests have been conducted").

112. *See* OECD, GLOBAL FORUM ON TAXATION, *A Process for Achieving a Global Playing Field, Berlin*, June 2004, http://www.oecd.org/dataoecd/13/0/31967501.pdf (stating that "the level playing field in respect of exchange of information requires that all jurisdictions, OECD and non-OECD members, should act in a manner consistent with the concept in their bilateral relationships and more broadly"); s*ee also* OECD, TAX CO-OPERATION, TOWARDS A LEVEL PLAYING FIELD, 2010 Assessment by the Global Forum on Taxation, http://www.oecd.org/document/38/0,3746,en_2649_33745_46091942_1_1_1_1,00.html (presenting country data with regard to treaties and legislation that allow for tax information exchanged); *see also* Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 BROOK. J. INT'L L. 783, 786 (2009) (noting that the OECD established the Global Forum on Taxation to discuss transparency and tax information exchange issues).

113. *See* John Ridgway, *The Pacific Islands Region: Being on the OECD Grey List*, MONDAQ, Oct. 2, 2009, http://www.mondaq.com/australia/article.asp?articleid=86952 (stating OECD wishes to circumvent secrecy programs through the implementation of mechanisms for transparency and exchange of information); *see also* Bruce Zagaris, *Revisiting Novel Approaches to Combating the Financing of Crime: A Brave New World Revisited*, 50 VILL. L. REV. 509, 545 (asserting that the OECD introduced a harmful tax practices initiative designed to combat tax evasion, level the playing field among sovereigns in tax policy and facilitate better cooperation in tax matters).

114. *See* Pricewaterhouse Coopers Global Technology Centre, *Anti-Money Laundering: New Rules, New Challenges, New Solutions*, Oct. 2002, at 25 ("Complex cross-border financial and communication systems, disparate laws and regulations, and increasingly sophisticated money laundering schemes all contribute to the challenges posed by money laundering.").

115. *See* Insop Pak, *International Finance and State Sovereignty: Global Governance in the International Tax Regime,* 10 ANN. SURV. INT'L & COMP. L. 165, 195 (2004) (stating that cooperative efforts have been made to harmonize or coordinate national tax rates, particularly in the area of capital income taxation); *see also* Lisa Philipps & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, 34 BROOK. J. INT'L L. 797, 856 (2009) (noting that it is argued that international coordination is essential to stopping harmful tax competition with respect to corporate tax incentives).

power,[116] some commentators extended the notion of sovereign duty to the design of tax systems that would be more suitable for a global economy, with the expectation that domestic tax policies take into account the needs of the world community, which would reach a justifiable result.[117]

The Harmful Tax Initiative argues from a free market perspective that the tax policies of certain countries undermine free competition and trust in tax systems.[118] In other words, if tax policies of certain countries are not designed upon principles striving for international tax neu-

116. *See* Paul R. Williams & Meghan E. Stewart, *Prevention: Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?* 40 CASE W. RES. J. INT'L L. 97, 105 (2007–8) (asserting that on the debate of human intervention, the concept of sovereignty shifted from granting a legal basis for intervention to creating duties and protections the sovereign owes its citizens). *See generally* INT'L COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001).

117. *See* Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INT'L L. 99, 151 (2009) (stating that "a growing body of scholarship suggests a movement toward seeing domestic taxation as inherently and indelibly a global governance issue, which must be guided by some universal principles about what people owe and are owed as citizens of the world as well as members of particular states"); *see also* Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 30, 199–236 (G.H. Fox & B.R. Roth eds., 2002) (saying that the state will be important still in the foreseeable future, but the components of the state will be networked "with their functional counterparts wielding governmental authority at all levels of political organizations. They will also interact with the same range of non-state actors transnationally as they do domestically"); *see also* Mart Pieth, *International Standards Against Money Laundering*, *in* A COMPARATIVE GUIDE TO ANTI-MONEY LAUNDERING: A CRITICAL ANALYSIS OF SYSTEMS IN SINGAPORE, SWITZERLAND, THE UK AND THE USA 416 (Mark Pieth & Gemma Aiolfi eds., 2004) (suggesting that by monitoring cash transactions and wire transfers for AML purposes, it could be understood as well "that the AML is just as much about creating instruments of global control over money flows in an attempt to abolish national currency control, and to react to the failing national overview over capital movements").

118. *See* OECD, CENTRE FOR TAX POLICY AND ADMINISTRATION, Harmful Tax Practices, http://www.oecd.org/department/ 0,3355,en_2649_33745_1_1_1_1_1,00.html (commenting that "[c]ompetitive forces have encouraged countries to make their tax systems more attractive to investors. However, some tax practices are anti-competitive and undermine fair competition and public confidence in tax systems"). *But see* CHRIS EDWARDS & DANIEL J. MITCHELL, GLOBAL TAX REVOLUTION: THE RISE OF TAX COMPETITION AND THE BATTLE TO DEFEND IT 133–92 (2008) (arguing that tax competition allows freedom of choice of taxpayers, keeping politicians from raising taxes, and "encourag[ing] them [politicians] to implement better tax policies and be more frugal with taxpayer money." Further, "If high-tax nations want to reduce tax avoidance and evasion, they should fix their own tax systems by cutting high tax rates and pursuing fundamental tax reforms."). *See generally* HOYT BARBER, TAX HAVENS TODAY: THE BENEFITS AND PITFALLS OF BANKING AND INVESTING OFFSHORE (2007) (arguing that using tax havens might be a way of preserving citizens' freedom, the author indicates some ways of using tax havens).

trality, namely, capital export neutrality and capital import neutrality, which minimize tax considerations in investment decisions,[119] then these tax policies produce inefficient results in the "global allocation of capital."[120] More important, to have a meaningful debate about the impact of those principles, it is necessary first to have transparency and access to the information.[121]

The Harmful Tax Initiative calls for a global coordination of nation-based tax systems to avoid one-state tax policies poaching the tax base of other countries.[122] It raises the question, If in this context of coordinating certain tax policies globally, could it be possible to consider how to arrange for an equitable basis to benefit developing countries? Will coordination involve only a number of unilateral measures benefiting rich countries, or will it be an opportunity for rethinking the entire architecture of the taxation power of sovereign states? Kimberley Brooks, for example, argues that one of the most important challenges nowadays is the enormous difference in living standards among countries.[123] To contribute in overcoming that challenge, she

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119. *See* Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1568–69 (2009) (asserting that capital export neutrality and capital import neutrality have become the principal tools used by policy makers and scholars to analyze the impact of international tax policies on capital mobility). *See generally* Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV 79, 102–3 (2002) (stating that rather than favoring capital export neutrality or capital import neutrality, location neutrality is achieved when a resident taxpayer is indifferent as between a domestic investment and a foreign investment with the same pre-tax rate of return).

120. *See* Michael S. Knoll, *Reconsidering International Tax Neutrality*, SCHOLARSHIP AT PENN LAW, May 2009, at 3, http://lsr.nellco.org/upenn/wps/papers/277. Further, the author explains that the two principal international tax neutrality propositions, Capital Export Neutrality (CEN) and Capital Import Neutrality (CIN) relate to how tax considerations will affect individual decisions and thus change the market equilibrium. CEN postulates that tax considerations should not influence whether investors resident in one jurisdiction invest their capital at home or abroad. If the tax system satisfies CEN, business, not tax, considerations will determine where investors invest. CIN postulates that tax considerations should not influence whether domestic investors or foreign investors make a particular investment. If the tax system satisfies CIN, business and not tax considerations will determine who makes which investments. *Id.* at 3–4. Further, Knoll argues that the debate about CEN and CIN has been misleading when, for example, it is accepted that "a tax system cannot simultaneously satisfy both CEN and CIN without harmonizing tax rates." *Id.* at 42.

121. *See* ROLAND DAHLMAN, CORPORATE FORM AND INTERNATIONAL TAXATION OF BOX CORPORATIONS 99–100 (2006) (explaining the tax neutrality principle, he pointed out that "[t]he concept of tax neutrality assumes full taxpayer disclosure and compliance and resulting correct taxation. It may only result from lawful practices. The unlawful tax benefit obtained by a non-disclosing and non-compliant taxpayer may result in distortion").

122. *See* OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 14–16 (1998) (explaining that globalization has increased the spillover effect of domestic tax policies among countries and has made it possible that "countries can exploit these new opportunities by developing tax policies aimed primarily at diverting financial and other geographically mobile capital . . . induc[ing] distortions in the pattern of trade and investment and reduc[ing] global welfare."); *see also* Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259, 309 (2003) (noting that the goal of the international tax rules is to divide income among competing countries with taxation claims for such income so that all items of income are fully taxed only once).

123. *See* ANTHONY GIDDENS, SOCIOLOGY 389 (Polity, 2006) (acknowledging the vast differences in standards of living among nations); *see also* LESZEK BALCOEROWICZ, LIVING STANDARDS AND THE WEALTH OF NATIONS: SUCCESS AND FAILURES IN REAL CONVERGENCE 395 (MIT Press, 2006) (explaining the progression of divergent standards of living).

suggests analyzing how international tax rules can be used for development assistance.[124] To begin with, international tax treaties should also focus on a "just allocation of resources."[125]

Regardless of how these questions are ultimately answered, at the global level the key priority is the adoption and implementation of tax information exchange treaties.[126] The United States has tax treaties with over 60 countries,[127] including Canada,[128] Germany,[129] and Mexico,[130] to name a few. The Cayman Islands, a commonly identified "tax haven," has even concluded a tax information exchange treaty with the United States[131] and has unilaterally

124. *See* David Schneider, Dividing to Unite, 2009-SUM FED. B.A. SEC. TAX'N REP 12, 12 (2009) (exemplifying that international tax rules should be analyzed to provide assistance); *see also* Paul R. McDaniel, *The U.S. Treatment of Foreign Source Income Earned in Developing Countries*, 35 GEO. WASH. INT'L L. REV 265, 265 (2003) (providing a specific example in which the United States may analyze its international tax rule to provide development assistance).

125. *See* Kimberley Brooks, Tax Treaties as a Mechanism for the Just Distribution of Income Between Nations, Paper presented at the annual meeting of the Law and Society Association, July 6, 2006, 2009-06-01, *available at* http://www.allacademic.com/meta/p96548_index.html (discussing the possible contribution of international tax rules by developed countries to assist developing countries); *see also* FLIP DE KAM, ECONOMIC EFFECTS OF AND SOCIAL RESPONSES TO UNFAIR TAX PRACTICES AND TAX HAVENS 20 (OECD, 2000) (stating ways in which the international tax rule can be changed to provide development assistance).

126. *See* Andre R. Fiebig, *International Drug Traffic*, 84 AM. SOC'Y INT'L L. PROC. 1, 3, 1990 (providing an example in which the implementation of tax information exchange treaties is beneficial). *See generally* Bruce A. Blonigen & Ronald B. Davies, The Effects of Bilateral Tax Treaties on U.S. FDI Activity (University of Oregon Economics Working Paper No. 2001-14, 2001), *available at* http://ssrn.com/abstract=445980 or DOI: 10.2139/ssrn.445980 (suggesting that the main purpose of tax treaties is to curtail tax evasion, instead of promoting investments).

127. *See United States Income Tax Treaties—A to Z,* INTERNAL REVENUE SERVICE, http://www.irs.gov/businesses/international/article/0,,id=96739,00.html (providing a comprehensive list of the United States' international tax treaties); *see also* Phil Morrison, Gretchen Sierra, Harrison Cohen & Maruti Narayan, *U.S. Tax Treaty Update*, DELOITTE, May 1, 2009, http://www.deloitte.com/view/en_GX/global/08cecf6d88912210 VgnVCM 100000 ba42f00aRCRD.htm (stating recent developments on international tax treaty initiatives by the United States).

128. *See* Department of Finance Canada, *Notices of Tax Treaty Developments*, http://www.fin.gc.ca/treaties-conventions/treatystatus_-eng.asp#status (establishing the in-force status of the U.S.-Canada tax treaty); *see also* GARY CLYDE HUFBAUER, NORTH AMERICAN FREE TRADE 89 (Peterson Institute, 1992) (explaining the elements of the tax treaty between the United States and Canada).

129. *See* Bundesministerium der Finanzen, Doppelbesteuerungsabkommen—DBA—sowie weitere staatenbezogene Veröffentlichungen, http://www.bundesfinanzministerium.de/nn_398 08/DE/Wirtschaft__und__Verwaltung/Steuern/000.html; *see also* I.R.S. Publ'n 901 (Feb. 17, 2011) (outlining the various benefits and provisions Germany and the United States share with each other as a result of their tax treaty).

130. Servicio de Administracion Tributaria (SAT), Convenios Internacionales, http://www.sat.gob.mx/sitio_internet/informacion_fiscal/legislacion/52_3558.html; *see also* I.R.S. Publ'n 901 (Feb. 17, 2011) (detailing the provisions of the tax treaty between the United States and Mexico).

131. *See* Hale E. Sheppard, *Only Time Will Tell: The Importance of the Statute of Limitations in an Era of Sophisticated International Tax Structuring*, 30 BROOK. J. INT'L L. 453, 460 (stating that the United States has signed tax information exchange agreements with several islands, including the Cayman Islands); *see also* OECD, COUNTERING OFFSHORE TAX EVASION, http://www.oecd.org/dataoecd/43/59/43775845.pdf, Jan. 4, 2011 (listing the Cayman Islands as a country with a tax information exchange agreement with the United States).

incorporated into its domestic laws procedures for providing tax information to certain countries.[132] By some accounts, there are more than 1,300 double taxation treaties worldwide.[133]

But this coordination by way of bilateral treaties may prove to be not enough.[134] It seems we are at an incipient stage similar to that of previous bilateral coordination efforts in other areas such as international postal communications and maritime commerce, to name a few.[135] For instance, Avi-Yonah suggests that considering there is a significant network of bilateral double taxation treaties, certain rules contained in double taxation treaties (e.g., foreign tax credit rules) have become customary law.[136] The existence of such bilateral taxation coordination is not necessarily the result of country-specific circumstances but is due to the adoption of bilateral tax treaties becoming the norm after World War II,[137] at a time when countries' tax regimes were much more different from each other than they are today.[138] Today, national tax

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132. *See* Cayman Islands Tax Info. Authority, http://www.tia.gov.ky (providing the statutory responsibilities of the Cayman Islands under its Tax Information Authority Law); *see also* Cayman Islands Government: Tax Cooperation Assistance, http://www.gov.ky/ portal/page?pageid=1142,4315113&_dad=portal&schema=portal (explaining that the Cayman Islands are making a unilateral effort to exchange information in tax matters which is reflected in changes to its domestic regime).

133. *See* Institute of Chartered Accounts, Double Taxation Treaties, noting that there are more than 1,300 double tax conventions in existence worldwide). *But see* DANIEL VITOR BELLAN, INDIVIDUALS' INCOME UNDER DOUBLE TAXATION CONVENTIONS: A BRAZILIAN APPROACH 1 (Natali de Vicente Santos trans., 2010) (stating that there are currently more than 2,000 double taxation treaties worldwide).

134. *See* Alison Christians, *Networks, Norms and National Tax Policy*, 9 WASH. U. GLOBAL STUD. L. REV. 1, 12–13 (explaining that the experts who initially recommended bilateral treaties as the way for nations to exchange information did not do so because bilateral treaties were the best method); *see also* Anthony Todero, *The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem*, 19 MINN. J. INT'L L. 241, 249–51 (2010) (discussing several drawbacks to exchanging information through bilateral treaties such as the exchange of incomplete or unnecessary).

135. *See* DAVID M. HENKIN, THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATIONS IN NINETEENTH-CENTURY AMERICA 172–73 (2006) (chronicling the replacement of discrete bilateral agreements by the World Postal Union of 1874). *See generally* BENJAMIN PARAMESWARAN, THE LIBERALIZATION OF MARITIME TRANSPORT SERVICES: WITH SPECIAL REFERENCE TO THE WTO/GATS FRAMEWORK 141–42 (2004) (recognizing that a multilateral framework is ideal for maritime transport services but acknowledging that bilateral agreements are easier and are in widespread use).

136. *See* Reuven S. Avi-Yonah, *Double Tax Treaties: An Introduction* 1–2 (Dec. 3, 2007), http://ssrn.com/abstract=1048441 (arguing that near identity among double taxation treaties is indicative of customary international law). *But see* Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime,* 84 TUL. L. REV. 125, 126–27 (2009) (contrasting the Avi-Yonah theory with an opposing theory that describes cross-border taxation as anarchic and arguing that neither provides a suitable means of curtailing tax evaders).

137. *See* ROBERT E. BAUMAN, WHERE TO STASH YOUR CASH LEGALLY: OFFSHORE HAVENS OF THE WORLD 43 (2007) (explaining the opportunistic tax bonanza that followed World War II as a result of decolonization and bilateral tax treaties). *But see* THE INTERNATIONAL TAXATION SYSTEM 49–50 (Andrew Lymer & John Hasseldine eds., 2002) (attributing the growth of international investments after World War II to international tax agreements formulated by supranational bodies).

138. *See* Reuven S. Avi-Yonah, *Double Tax Treaties: An Introduction* 15 (Dec. 3, 2007), http://ssrn.com/abstract=1048441 (hypothesizing that the reason that double tax treaties are bilateral is due to pre–World War II norms and historical differences between tax systems). *But see* TURKI ALTHUNAYAN, DEALING WITH THE FRAGMENTED INTERNATIONAL LEGAL ENVIRONMENT: WTO, INTERNATIONAL TAX AND INTERNAL TAX REGULATIONS 113–14 (2010) (discussing institutional attempts to remedy overlapping tax claims after World War I).

regimes more closely resemble each other, and multilateral treaties prove to be effective means of fostering global coordination.[139] In addition to regional double-taxation treaties,[140] it may therefore be the time to initiate worldwide negotiations over a multilateral double-taxation treaty.[141] Additionally, in regard to tax havens, some commentators argue that international coordination should be based on multilateral tax principles,[142] because the bilateralism of double-taxation treaties "enhance[s] the sovereignty of many of these OFC states, leading to their continued appeal as locales from which to organize low tax multinational business ventures" because they showed thereby their good governance.[143]

Nevertheless, substantial disagreements remain.[144] While it is true that more global cooperation is taking place in more areas through the consent of states,[145] the tax policies of some countries that have significant negative effects on other countries have yet to rise to the level of

139. *See* OECD: CONDENSED VERSION 9–10 (2010) (measuring the success of the model convention, a multilateral agreement, by the number of bilateral conventions that incorporate key provisions from the model convention). *But see* Josef Schuch, *Bilateral Tax Treaties Multilateralized by the EC Treaty*, *in* MULTILATERAL TAX TREATIES: NEW DEVELOPMENTS IN INTERNATIONAL TAX LAW 33, 35 (Michael Lang et al., eds., 1998) (warning that distinct agreements that incorporate OECD provisions often include divergent terms).

140. *See* OECD: CONDENSED VERSION, 2 (2010) (listing the OECD member parties, including the European Commission); *see also* Multilateral Treaties, http://www.mcgill.ca/tax-law/treaties/multilateraltreaties (providing links to several regional multilateral tax treaties).

141. *See* Reuven S. Avi-Yonah, *Double Tax Treaties: An Introduction* (2007), *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 99, 99 (Karl P. Sauvant and Lisa E. Sachs eds., 2009) (describing how certain parts of DDTs are so prevalent that they could be considered customary international law); *see also* Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 637 (1998) (defining a double-taxation treaty as a bridge between parties that allows tax benefits to states and not investors).

142. *See* Whitney Whisenhunt, Note, *To Zedillo or Not to Zedillo: Why the World Needs an Ito*, 16 TEMP. INT'L & COMP. L.J. 541, 544 (2002) (claiming that increased globalization needs a multilateral framework because when individuals and corporations are allowed to pay lower taxes, it places a burden on developing and developed countries); *see also* Gregory Rawlings, Responsive Regulation, Multilateralism, Bilateral Tax Treaties and the Continuing Appeal of Offshore Financial Centres 2–3 (Centre for Tax Sys. Integrity, Working Paper No. 74, 2005), *available at* http://ctsi.anu.edu.au/publications/WP/74.pdf (suggesting that a move toward multilateral tax principles and away from fiscal bilateralism would pave the way for success for the offshore).

143. *See* Rawlings, *supra* note 142 (explaining how bilateralism affects the sovereignty of many OFC states). *But see* COMMISSION ON CAPITAL FLIGHT FROM DEVELOPING COUNTRIES, TAX HAVENS AND DEVELOPMENT: STATUS, ANALYSIS AND MEASURES, PRELIMINARY REPORT FROM THE NORWEGIAN GOVERNMENT 143 (2008), *available at* http://www.regjeringen.no/upload/UD/Vedlegg/Utvikling/tax_report.pdf (2008) (concluding that "the use of tax treaties does not eliminate the harmful structures in tax havens."). *See generally* MICHAEL LANG ET AL., MULTILATERAL TAX TREATIES, NEW DEVELOPMENTS ON INTERNATIONAL TAX LAW, 1998, especially Helmut Loukota, *Multilateral Tax Treaty versus Bilateral Treaty Network*, at 85; *see also* Richard L. Reinhold, *Some Things that Multilateral Tax Treaties Might Usefully Do,* 57 TAX LAW. 3, 3 (2004) (suggesting that in certain settings a multilateral tax treaty could address some difficult problems).

144. *See* Whisenhunt, *supra* note 142 (asserting that the bilateral tax treaty no longer makes sense because there is little international coordination, forcing countries to act on their own anyway); *see also* COMMISSION ON CAPITAL FLIGHT, *supra* note 143 (concluding that "the use of tax treaties does not eliminate the harmful structures in tax havens.").

145. *See* Charles E. McLure Jr., *Legislative, Judicial, Soft Law, and Cooperative Approaches to Harmonizing Corporate Income*, 14 COLUM. J. EUR. L. 377, 385–86 (2008) (explaining that enhanced cooperation enables states to produce tax uniformity; at least in the European Union, cooperation between states is through consent and voluntary); *see also* Vandevelde, *supra* note 141 (defining a double taxation treaty as a bridge which, by definition, requires two states to cooperate).

such egregious practices as piracy and slavery (except when related to other serious crimes such as drug trafficking, arms dealing, and terrorism).[146] It is therefore difficult to justify a global regime of cooperation of the same type occurring in other areas, in which their transnational negative impact was legitimately accepted as a universal concern.[147] We are, however, at an early stage of multilateral coordination, where tax policies are becoming a matter of global concern.[148]

Balancing Sovereignty and Transparency

National sovereignty, in regard to taxation, is still paramount because it expresses the interest of individual governments in obtaining revenue for sustaining domestic services and accomplishing national goals.[149] In contrast, there is a truism that some global challenges cannot be tackled successfully solely with national policies,[150] and therefore, coordination among

146. *See* Robert A. Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18, 56 (1993) (asserting some positive aspects of the global cooperation, which rest on an assumption that regardless of the possible negative effects on countries, the practices do not rise to a level of egregious or unacceptable practices); *see also* George M. Melo, Comment, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty? (A Critique of the OECD's Report: "Harmful Tax Competition: An Emerging Global Issue")*, 12 PACE INT'L L. REV. 183, 201 n.105 (2000) (discounting the negative effects certain tax levels will have on other countries as political decisions which do not reach a threshold of intolerability).

147. *See* Kimberly Carlson, *When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as It Relates to Globalization, Sovereignty and Privacy,* 35 J. MARSHALL L. REV. 163, 178 (2002) (voicing the Pacific Islands' opinion that global regulation of taxes by the OECD is improper and detrimental to nations whose main income is from offshore developments); *see also* Mitchell B. Weiss, *International Tax Competition: An Efficient or Inefficient Phenomenon?*, 16 AKRON TAX J. 99, 130 (2001) (arguing that there is little that can be done and nothing that should be done to bring taxation into a global regulation scheme).

148. *See* OECD, HARMFUL TAX PRACTICES: AN EMERGING GLOBAL ISSUE 7 (1998), http://www.oecd.org/dataoecd/25/26/44430243.pdf (declaring that globalization is affecting tax practices and needs to be addressed by the OECD); *see also* Kristin E. Hickman, Note, *Should Advance Pricing Agreements Be Published?*, 19 NW. J. INT'L L. & BUS. 171, 194 (1998) (suggesting that tax law is becoming a global concern and can no longer be determined by the United States alone).

149. *See* Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 580–81 (2009) (discussing the battle between haven nations and member nations to establish national sovereignty in tax policy creation); *see also* Marjorie E. Kornhauser, *A Legislator Named Sue*: *Reimagining the Income Tax*, *in* CRITICAL TAX THEORY: AN INTRODUCTION 75, 77 (2009) (declaring that "[a]lmost anything can be, and has been, taxed. The selection of the tax base (i.e., the object of the tax) reflects not just a need for revenue or the ease of administration but also values of society, as interpreted by the legislature").

150. *See* Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organizations*, 24 U. PA. J. INT'L ECON. L. 1, 53 (2003) (explaining that international cooperation in policy making is required when one country's decisions affect others); *see also* Cindy Braspenning, *Human Trafficking in the Netherlands: The Protection of and Assistance to Victims in Light of Domestic and International Law and Policy*, 1 INTERCULTURAL HUM. RTS. L. REV. 329, 356 (2006) (classifying human trafficking as a global issue needing transnational policy making).

states to confront those challenges efficiently is called for.[151] "[T]ransnational problems, including economic, environmental, terrorist, cultural, criminal, and other threats to national security . . . require regional and even global . . . cooperation and coordination."[152] Hence, the cross-border negative impact of those problems, even caused or worsened by states' national policies, create the basis for claiming the need of universal cooperation.[153] But should a state be concerned about the tax revenues of another state?[154] The loophole of my neighbor is my opportunity in a world based on maximizing efficiency through competition.[155] It could be,

151. *See* Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 271 (2007) (describing the need for an international convention on weapons of mass destruction to further the goals of national security on an international scale); *see also* J. Ashley Roach, *Agora: Piracy Prosecution: Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 405 (2010) (identifying piracy as a global issue that nations are required by convention to cooperate on).

152. *See* Graham Allison, *The Impact of Globalization on National and International Security, in* GOVERNANCE IN A GLOBALIZING WORLD 72, 84 (Joseph S. Nye & John D. Donahue, eds., 2000) (outlining the areas that have been negatively affected by globalization and the need to address these consequences using regional and global mechanisms of cooperation and coordination); *see also* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 253 (2008) (showing that after September 11, 2001, national security agencies began to establish international institutions to combat terrorism).

153. *See* Andrew Ayers, *UN Report: The Financial Action Task Force: The War on Terrorism Will Not Be Fought on the Battlefield*, 18 N.Y.L SCH. J. HUM. RTS. 449, 450 (2002) (arguing that one of the most effective ways to combat terrorism would be for states to fight money laundering by making international tax laws less secretive); *see also* Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 TUL. L. REV. 125, 146 (2009) (noting that an increased harmonization among states is necessary for combating tax havens, but when that harmonization is lacking, cooperation is very difficult).

154. *See* Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty,* 26 BROOK. J. INT'L L. 1641, 1643 (2001) (noting that only a limited number of countries would subscribe to a multilateral treaty regarding tax policy harmonization). *Cf.* Paul B. Stephan, The Problem With Cooperation (June 2009) (Univ. of Va. Public Law and Legal Theory, Working Paper 126), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art126 (arguing that on competition policy, international cooperation is weak).

155. *See* JASON CAMPBELL SHARMAN, HAVENS IN STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 81–86 (2006) (summarizing the arguments based on the notion of sovereignty in the debate between the OECD initiative and the targeted jurisdiction as tax havens. For instance, OECD argued, *inter alia*, that sovereignty implies a duty of not affecting compliance of other countries' laws, and that by discouraging harmful tax practice, a "truer" fiscal sovereignty would be preserved. Targeted countries as tax havens argued, *inter alia*, that "they had a clear right to set their own taxation laws, independent of the consequences for others, and that any interference with this right was plainly illegitimate and violated the principle of nonintervention."); *see also* Patrick J. Kehoe, *Policy Consideration Among Benevolent Governments May Be Undesirable,* 56 REV. ECON. STUDIES 289, 295 (1989) (arguing that competition among governments often leads to greater economic efficiency, and for some countries, this is more preferable than cooperation).

however, that additional restrictions to the power of taxation become universally accepted.[156] As Diane Ring points out, tax policy choices are made "within [states'] own domestic system (e.g., pressure from powerful taxpayers) and by the need to account for the implications of their tax rules globally (e.g., will the state's new tax be deemed a creditable foreign tax by other countries)."[157] So, justifying tax practices considered harmful on sovereignty grounds may not be acceptable if it does not take into account extraterritorial spillover effects on other countries.[158] So, the standards suggested by the OECD could become another constraint or consideration in the tax policy choices a country can make.[159]

There is little doubt that transparency and cooperation on tax matters are becoming international standards.[160] But to continue consolidating cooperation on tax matters, however,

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156. *See* Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151, 1157 (1981) (demonstrating that international tax treaties enable countries to come to restrictive agreements that recognize each state's right to compete). *See generally* Michael Keen & Jenny E. Ligthart, *Incentives and Information Exchange in International Taxation,* 13 INT'L TAX PUB. FIN. 163, 163 (2004) (noting that restrictions of the power to tax are increasingly accepted in the international community, as exemplified by the fact that under the OECD's project to combat "harmful tax practices," 30 of the 35 countries identified as tax havens have entered into agreements to be more transparent).

157. *See* Ring, s*upra* note 149 (suggesting that states decide their tax policies based on the interests of their citizens as well as what would be accepted globally); *see also* Kingson, *supra* note 156, at 1156 (arguing that countries' tax policies are primary reflections of their national interests, and therefore the incentive when forming internal law is to make it more difficult for other countries to compete).

158. *See* Ring, *supra* note 149 (stating that resident states are fearful of competing states undermining their "tax sovereignty"; however, there is no clearly defined scope of this sovereignty); *see also* Eric T. Laity, *The Competence of Nations and International Tax Law*, 19 DUKE J. COMP. & INT'L L. 187, 258 (2009) (suggesting "the institutional competence of nations through standards and limitations that reduce the abuse of sovereign discretion and address international collective action problems in the pursuit of global economic development. These standards and limitations allocate prescriptive jurisdiction among nations over the global income tax base"). *See generally* Allison Christians et al., *Taxation as Global Socio-Legal Phenomenon*, 14 ISLA J. INT'L & COMP. L. 303 (2008) (arguing tax scholarship should turn to fields such as international relations, organizational theory, and political philosophy to provide a broader framework for understanding the rapid changes that are taking place in tax policy and politics in the United States and around the world).

159. *See* Ring, *supra* note 149 (discussing the issues of maintaining sovereignty in terms of taxation but striving to abide by international standards provided by the OECD); *see also* Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Restrospective After a Decade*, 34 BROOK. J. INT'L L. 783, 785 (2009) (stating that countries make commitments to the OECD standards in order to avoid being listed as uncooperative tax havens).

160. *See* Alison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INT'L L. 99, 127 (2009) (asserting that nations have an obligation to comply with increasingly universal community standards of transparency and information exchange); *see also* Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KAN. L. REV. 779, 781 (2002) (commenting that international standards, including transparency and information disclosure, have emerged from the rules of financial or corporate laws).

more is needed.[161] There must be established an evident, widely accepted link between tax revenues and other shared goals,[162] such as global security or equitable distribution of basic needs; otherwise it would be difficult to sustain an ongoing global cooperation on taxation issues.[163] The 2009 Report from the Norwegian Government Commission on Capital Flight from Developing Countries is a sophisticated attempt to establish that link,[164] pointing out that tax havens have, *inter alia*, the following negative impacts:

- increasing the risk premium in international financial markets;[165]
- undermining the operation of the tax system and public finances in non-tax-haven jurisdictions;[166]

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161. *See* OECD: BRIEF 4 (Feb. 18, 2011), http://www.oecd.org/site/0,3407,en_21571361_43854757_1_1_1_1_1,00.html (explaining that progress has been made in terms of increased transparency and exchange of information and that these standards are vital, but more needs to done, especially in the wake of recent financial crisis); *see also* JAMES K. JACKSON, THE OECD INITIATIVE ON TAX HAVENS 11 (2010) (indicating that there has been progress made, but the OECD will continue to examine issues of increased transparency and exchange of information).

162. *See* Stanford G. Ross, *Political and Social Aspects of International Tax Policy in the New Millennium*, 26 BROOK. J. INT'L L. 1303, 1312 (2001) (stating that the two separate institutions of social programs and taxation must come together if tax policies are to have a more significant effect on promoting social endeavors); *see also* Taylor Morgan Hoffman, Recent Development, *The Future of Offshore Tax Havens*, 2 CHI. J. INT'L L. 511, 513 (2001) (describing that in addition to losing revenue due to tax havens, OECD nations wish to combat international criminals who are using the beneficial policies of offshore accounts to launder money).

163. *See* Diane Ring, *Who Is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World*, 33 FORDHAM INT'L L.J. 649, 706 (2010) (describing an OECD report that asserts without international cooperation on taxation, there is not much of an incentive for a nation to cease being a tax haven because the capital will simply be moved to another nation with greater incentives); *see also* Valpy FitzGerald, *International Tax Cooperation and Capital Mobility*, 77 CEPAL REV. 65, 74 (2002) (asserting that in response to the September 11, 2001, attacks, international standards of transparency, exchange of information and fair tax competition were adopted in anti-terrorism reforms by a number of countries).

164. *See* TAX HAVENS AND DEVELOPMENT: PRELIMINARY REPORT 7 (2009) (Nor.) (explaining that the commission will examine the issues surrounding tax havens and will propose a number of recommendations and measures that could help remedy the situation); *see also* PETER VAN LIESHOUT ET AL., MORE AMBITION: DEVELOPMENT POLICY IN TIMES OF GLOBALIZATION 210 (2010) (discussing the Norwegian commission's recommendation that making multinational corporations be more transparent in their financial reports and report tax information about each country they operate in as a possible remedy).

165. *See* GOV'T COMM'N ON CAPITAL FLIGHT FROM POOR COUNTRIES, *Tax Havens and Development: Status, Analysis, and Measures, Report From the Norwegian Government Commission on Capital Flight from Developing Countries*, at 11, delivered to Erik Solheim, Minister of the Environment and International Development (June 18, 2009), *available at* http://www.regjeringen.no/upload/UD/Vedlegg/Utvikling/tax_report.pdf (describing the variety of ways in which tax havens cause an increase of premiums in international tax markets); *see also* Alex Cobham, *Tax Havens, Illicit Flows and Developing Countries* 7 (Christian Aid, Working Paper, 2009) (stating that "tax havens increase the risk premiums in international financial markets" (quoting the Norwegian Government Commission on Capital Flight from Poor Countries (2009))).

166. *See* OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 21 (1998), www.oecd.org/dataoecd/33/0/1904176.pdf (asserting that the deregulation of financial markets in non-haven countries has revealed the adverse effects of tax havens); *see also* Blair Downey, *E-Commerce: The Taxman's Nemesis*, 2 ASPER REV. INT'L BUS. & TRADE L. 53, 60 (2002) (arguing that the use of tax havens often causes relocation and effectively reduces employment in non–tax haven jurisdictions).

- increasing the inequitable distribution of tax revenues;[167]
- reducing the efficiency of resource allocation in developing countries, making economic crimes more profitable, encouraging rent-seeking and reducing private incomes in developing countries;[168] and
- damaging institutional quality and growth in developing countries.[169]

But, at any rate, to reach the level of a universally perceived need for cooperation on taxation, blacklisting countries without true universal participation does not work.[170] Unsurprisingly, the Report from the Norwegian Government Commission on Capital Flight from Developing Countries does not consider the use of listing adequate.[171] Even if the blacklisting signals legitimate concerns on tax matters, blacklisting without participation places the targeted countries in the awkward position of being unable to articulate a defense for the right of a

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167. *See* OECD, *supra* note 166, at 22 (affirming that tax havens have a "large adverse impact on the revenue bases of other countries"); *see also* Oleksandr Pashikhov, *International Taxation of Income Derived From Electronic Commerce: Current Problems and Possible Solutions*, 12 B.U. J. SCI. & TECH. L. 310, 312 (2006) (describing the use of tax havens as a "race to the bottom" with the effect of reducing tax revenues of all nations and undermining global welfare).

168. *See* CENTER FOR RESEARCH ON MULTINATIONAL CORPORATIONS, THE GLOBAL PROBLEM OF TAX HAVENS: THE CASE OF THE NETHERLANDS 2 (2008) (explaining that tax havens affect "the capacity of developing country governments to supply essential services to their populations"); *see also* Douglas J. Workman, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes*, 73 J. CRIM. L. & CRIMINOLOGY 675, 675 (1982) (affirming that the creation of a "veil of secrecy" allows taxpayers to conduct illegal activity in tax havens).

169. *See* GOV'T COMM'N ON CAPITAL, *supra* note 165, at 11–13 (2009) (concluding that "the use of tax treaties does not eliminate the harmful structures in tax havens"); *see also* Richard A. Johnson, *Why Harmful Tax Practices Will Continue After Developing Nations Pay: A Critique of OECD's Initiative Against Harmful Tax Comp. Offshore: The Dark Side of the Global Economy*, 26 B.C. THIRD WORLD L.J. 351, 361 (2006) (illustrating how the economies of developing nations often depend on tax havens and therefore are not self-sufficient).

170. *See* Akiko Hishikawa, *The Death of Tax Havens?*, 25 B.C. INT'L COMP. L. REV. 389, 396–97 (2002) (acknowledging the detrimental effects of the OECD blacklist on countries that have complied with its previous report); *see also* Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY J. INT'L L. 123, 136–37 (2004) (concluding that the effects of the blacklist impede international cooperation).

171. *See* GOV'T COMM'N ON CAPITAL, *supra* note 165, at 14, 22–27 ("The Commission has not demarcated tax havens in the form of a list, and believes that existing lists are inadequate for determining which jurisdictions possess harmful structures." Further, the Commission concluded that "*actual categorisations by international organisations are affected by the desire of many states to prevent their designation as a tax haven. Designations by international organisations are also partly the result of negotiation like processes*"); *see also* Luisa Blanco & Cynthia Rogers, *Endogenous Tax Policy and Economic Growth of Tax Havens*, INT'L ECON. AND ECON. POLICY 12 (2010), http://www.luismrodriguez.com/home/files/0209thendogeneity.pdf (arguing that "tax havens outperform non-tax haven countries and that this result is not driven purely by endogeneity of tax haven policies or initial condition. Thus, our results lend credence to Hines (2005a) conclusion that tax policies partly contribute to favorable growth of tax havens." (quoting James Hines, *Do Tax Havens Flourish? in* TAX POLICY AND THE ECONOMY 19, 65–99 (James Poterba ed., 2005))).

nation to define its own tax policies as legitimate members of the international community,[172] and it is not conducive to long-term cooperation.[173] Instead, blacklisting without participation fosters resentment, forecloses a dialogue about fairness in setting standards, creates the impression that elites, by way of informal groups, make self-serving decisions, and leaves the debate centered on the traditional, absolute notion of sovereignty.[174] To be sure, tax policies remain a core component of sovereignty, but there is little doubt that tax sovereignty must become transparent through, for example, TIEAs, and the tax policies of countries should be coordinated globally in a way that observes the privacy of individuals and encourages investment.[175] This process toward more transparency and coordination on tax matters should be as transparent, fair, and participatory as possible.[176] Ideally, it should become a propitious occasion to talk

172. *See* Philip Aldrick, *Blacklisted Swiss Angry Over "Tax Haven" Label*, THE TELEGRAPH (UK), Apr. 3, 2009, *available at* http://www.telegraph.co.uk/finance/financetopics/g20-summit/5101325/Blacklisted-Swiss-angry-over-tax-haven-label.html (revealing Swiss anger over not being included in the discussions of OECD blacklisting); *see also* Philip Aldrick, *G20 Summit: Blacklisted Tax Havens Face Sanctions*, THE TELEGRAPH (UK), Apr. 3, 2009, *available at* http://www.telegraph.co.uk/finance/financetopics/g20-summit/5096348/G20-summit-Blacklisted-tax-havens-face-sanctions.html (suggesting that the United States, the United Kingdom, and France are guiding the blacklisting of sovereign states).

173. *See* Heather Stewart, *OECD Renews Attack on Switzerland's Banking Secrecy*, THE GUARDIAN (U.K.), Apr. 10, 2009, *available at* http://www.guardian.co.uk/business/2009/apr/10/switzerland-bank-secrecy-tax-haven? INT CMP=ILCNETTXT3487 (illustrating the intensity of the struggle that has erupted between Switzerland and the OECD over the blacklisting issue); *see also* Felicity Lawrence, *Blacklisted Tax Havens Agree to Implement OECD Disclosure Rules*, THE GUARDIAN (U.K.), Apr. 7, 2009, *available at* http://www.guardian.co.uk/business/2009/apr/07/g20-banking (describing the international tension created by the blacklisting of tax havens).

174. *See* Matthew Collins, *Some U.S. States Booming in Tax Crimes . . . but They're Scarce Abroad*, THE SOVEREIGN SOCIETY,May 12, 2009, http://www.sovereignsociety.com/2009Archives1stHalf/051209WhereHaveAlltheTax HavensGoneWhyt/tabid/5652/Default.aspx (revealing that the reason behind the war on tax havens is an effort by the government to limit investment freedom); *see also* Welcome Page of the Sovereign Society, http://www.sovereignsociety.com/portals/0/landing/tax_havens_landing_0209.html?gclid=CPbAhLKal5oCFQENDQdfV6ULg (quoting President Obama as he attacked tax havens on the campaign trail).

175. *See* Protocol Modifying and Supplementing the Extension to the Netherlands Antilles of the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Certain Other Taxes, U.S.-Neth., art. X, Sept. 28, 1964, 15 U.S.T. 1900 (allowing both parties to the treaty to tax income generated in the Netherlands Antilles); *see also* Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation With Respect to Taxes on Income, U.S.-F.R.G., Dec. 20, 1954, 5 U.S.T. 2768 (showing another example of international cooperation on taxation issues).

176. Luckily, in 2004 the OECD Global Forum on Taxation adopted the notion of a global playing field, which for purposes of exchange of information "means the convergence of existing practices to the same high standards for effective exchange of information on both criminal and civil taxation matters within an acceptable timeline for implementation with the aim of achieving equity *and* fair competition." *See* OECD, A PROCESS FOR ACHIEVING A GLOBAL LEVEL PLAYING FIELD 3 (2004), http://www.oecd.org/datao ecd/13/0/31967501.pdf (calling for greater cooperation and fair competition in criminal and civil taxation matters); *see also* Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151, 1288–89 (1981) (asserting that the global tax system can be improved through cooperation and a better understanding of how the tax regimes of other states operate).

about how developing countries may, for instance, receive compensation for compliance costs in adopting standards that do not benefit them directly.[177]

The new contours of the relations between developed and developing nations, between rich and poor nations, on taxation matters is rapidly unfolding, disconcerting some of the players in the international financial system.[178] Some hard-liners argue for an old-fashioned and indefensible notion of sovereignty as a sacrosanct feature of states, intolerant of external restraints.[179] At the other extreme are those who are resentful of the rich and are pleased that the rich will finally have a more difficult time devising tax strategies that with the help of their lawyers and accountants, take advantage of perceived loopholes in the international system.[180] Arbitrage for tax purposes became more costly for private companies and wealthy individuals,[181] and the reputation costs for a country catering to those markets may ultimately become unbearable.[182] Nonetheless, the usefulness and benefits of offshore financial centers, offering ways to minimize inconsistencies and inefficiencies of tax policies in a given country, should

177. *See* JASON CAMPBELL SHARMAN & PERCY S. MISTRY, CONSIDERING THE CONSEQUENCES: THE DEVELOPMENT IMPLICATIONS OF INITIATIVES ON TAXATION, ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM, 177 (2008) (analyzing the cases of Barbados, Mauritius and Vanuato, the author concluded that the costs of implementing international standards on tax information exchange and AML/CFT areas exceeded the benefits for the respective international financial centers of those three countries); *see also* Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 MICH. J. INT'L L. 411, 481 n.287 (2004) (suggesting that developing countries may require an incentive, such as compensation, to balance the negative economic consequence of tax haven elimination).

178. *See* Alison Bennet, *Caribbean Economies Would Be Damaged by U.S. Efforts on Tax Havens*, *Official Says*, DAILY TAXREPORT, http://news.bna.com/dtln/DTLNWBsplit_display.adp?fedfid=12875190&vname=dtrnot&wsz=498889000&searchid=8065658&doctypeid=1&type=date&mode=doc&split=0&scm=DTLNWB&pg=0; *see also* Karen B. Brown, Book Note, *Harmful Tax Competition: The OECD View*, 32 GEO. WASH. J. INT'L. & ECON. 311, 315 (1999) (reviewing JAMES R. HINES, JR., THE CASE AGAINST DEFERRAL: A DEFERENTIAL RECONSIDERATION (1999)) (arguing that developing countries suffer because they do not have a fair say in their own tax schemes due to the influence and interference from developed nations and multinational corporations).

179. *See* Suzanne Walsh, Note, *Taxation of Cross-Border Interest Flows: The Promises and Failures of the European Union Approach*, 37 GEO. WASH. INT'L L. REV. 251, 251 (2005) (arguing that a country's right to structure its own tax regime is in that country's discretion); *see also* Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 579–81 (2009) (explaining that attempts to infringe upon the tax havens' policies equate with infringement upon the havens' state sovereignty).

180. *See* Representative Chaka Fattah, *Déjà Vu All Over Again: Reexamining Fundamental Tax Reform and Evaluating the Feasibility of a Transaction Tax in the 111th Congress*, 47 HARV. J. ON LEGIS. 327, 332–33 (2010) (acknowledging the legitimate concerns underlying the public skepticism toward both the tax system and creative tax planning advisors); *see also* Michael J. Graetz, *The David R. Tillinghast Lecture Taxing International Income: Inadequacy Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 N.Y.U TAX L. REV. 261, 321 (2001) (recognizing several publicly scrutinized examples of legal loopholes involving corporations that moved assets overseas).

181. *See* John Braithwaite, *Globalisation, Redistribution and Tax Avoidance*, 12 PUB. POL'Y RES. 85, 85 (2005) (describing how opportunities for international arbitrage arise for corporations through structural discontinuities and disparate tax treatment for different nations). *See generally* Adam H. Resenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 557 (2007) (identifying tax law arbitrage as a continuing problem despite efforts to ameliorate it).

182. *See* Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX. L. REV. 83, 150 (2007) (emphasizing that the strength of the developing country's reputation is an important factor contributing to its pursuit of certain tax schemes). *See generally* Daniel Orlow, Comment, *Of Nations Small: The Small State in International Law,* 9 TEMP. INT'L & COMP. L.J. 115, 130 (1995) (identifying reputation as an important aspect for aspiring offshore financial centers and giving an example of a scandal that harmed the image and reputation of tax havens in general).

not be forgotten but, rather, refined.[183] In the justifiable quest for demanding that tax havens adopt a legislative and regulatory framework allowing for tax cooperation, the wealth-producing benefits of using tax havens for the global economy should be taken into consideration.[184]

Key Considerations When Adopting Transparency on Tax Matters

When a country moves forward in adopting international standards on taxation, its government would be well advised to reflect on how to reconcile the sovereign power of taxation with the external demands for transparency.[185] Specifically, a government should answer the following questions satisfactorily:

Is there an equivalent, more effective way than existing national legislation to comply with the expected international standards?

How would taking away the advantages of using offshore financing structures impact consumers and companies both domestically and internationally?

How much is the direct and indirect income derived from offshore financial services? How is this income distributed domestically? Is there an alternative source of income for the country?

How do you strike a balance between the need for open exchange of information and an essential respect for privacy and confidentiality without jeopardizing constitutional and human rights to privacy?

Is it possible to establish a link between the tax policies of developed countries and the tax policies of developing countries in such a way that developing countries would receive foreign aid advantages for cooperating with tax authorities of developed countries? In reflecting on pos-

183. *See* Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT'L L.J. 377, 454 (2009) (claiming that offshore financial centers are at least as well regulated as onshore jurisdictions, and it is likely that there will be successful offshore financial centers 10, 20, and 50 years from now); *see also* Vito Tanzi, Symposium, *The Nature and Effects of Globalization on International Tax Policy Principal Papers Globalization, Technological Developments, and the Work of Fiscal Termites*, 26 BROOK. J. INT'L L. 1261, 1271–72 (2001) (noting that although offshore financial centers allow money and knowledge to be moved easily and cheaply, the G-7 has set up the Financial Action Task Force to deal with the negative effects of offshore financial centers).

184. *See* ANTHONY SANFIELD GINSBERG, TAX HAVENS 25 (1991) (stating that there are "four fundamental techniques used in formulating international tax plans using tax havens: distributing post-tax profits through jurisdictions with double-taxation agreements; allocating pre-tax profits to a low-tax jurisdictions; profit extraction; and minimizing taxes on executive remuneration"); *see also id*. at 45–46 (explaining that "[t]ax havens have a strong appeal for multinational corporations organized in foreign countries because of the advantages they offer for the legitimate avoidance or deferment of taxation on certain profits earned overseas. Profits harbored in a tax sanctuary enable working capital to be used in its cheapest form").

185. *See* Joseph F. Dimento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651, 683 (1998) (noting that a final decision on articles 14 and 15 of the NAFTA Agreement will generally consider the need to promote transparency as well as sovereignty); *see also* David Jolly, *Switzerland Vows to Help in Pursuit of Tax Cheats*, N.Y. TIMES, Feb. 16, 2011, at B4 (reporting that Switzerland has been moving toward adopting principles on transparency and information exchange when dealing with taxation within its borders).

sible solutions for small island economies facing an economic crisis due to the reduction or dismantling of its offshore industry, Mark Hampton and John Christensen conclude that "for small islands hosts of offshore finance is bleak since there is scant evidence of the existence of a practical or realistic alternative plan."[186]

What are the legitimate uses of offshore centers? What tax policies are acceptable for OECD countries and why? Which of these policies are driven by domestic, regional self-interests,[187] and which are necessary to maintain healthy global tax coordination?

How should an offshore financial center cooperate, given the current global financial crisis?

The argument for a nation's sovereign right of taxation remains compelling, but it is better accomplished without an outdated, absolute notion of sovereignty.[188] In a growing number of areas—environmental, security, human rights—the exercise of sovereign rights is conditioned by international demands for coordination.[189]

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186. Small Island Economies: Exploring Alternative Development Strategies to Hosting Offshore Finance 15 (Univ. of Kent, Working Paper No. 277, 2010), *available at* http://www.taxjustice.net/cms/upload/pdf/Hampton__Christensen_what_next_for_OFCs_WP227_July_2010.pdf (suggesting that small islands that house offshore financial centers will not have a bright economic future). *See generally* Aliki Darlow, *Jersey's Tax Information Exchange Agreements*, APPLEBY, http://applebyglobal.com/uploaded/Publication/1248_File_5.pdf (stating that "[a]s part of its negotiations for signature of a TIEA with individual OECD Member States, Jersey has received an economic benefits package that helps offset any costs expected to be incurred in supporting and complying with the creation of the OECD's desired equal trading environment.").

187. *See* MARK PIETH, A COMPARATIVE GUIDE TO ANTI-MONEY LAUNDERING: A CRITICAL ANALYSIS OF SYSTEMS IN SINGAPORE, SWITZERLAND, THE UK AND THE USA 22 (2004) (acknowledging that "the world is apparently accustomed to the fact that even in formalized international relations some powers have more say than others (take the Security Council of the UN), so that the NCCT process (and similar extensions of evaluation beyond members in the OECD's Harmful Tax Initiative) have so far not been the subject of fundamental critique"); *see also* George Mundstock, Comment, *What's on Second?*, 51 U. MIAMI L. REV. 1079, 1080–81 (1997) (explaining that through self-interest, a country can increase domestic welfare and a new U.S. international tax policy could be based on such self-interest).

188. *See* George M. Melo, Comment, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty?*, 12 PACE INT'L L. REV. 183, 186 (2000) (reasoning that since taxation remains an essential part of government, governments have now been forced to adjust their taxing procedures to operate within democratic societies); *see also* Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 197–98 (2008) (asserting that connection between sovereignty and taxation is required, and the right to tax forms one of the most intimate relationships between the sovereign and its people).

189. *See* Linda A. Malone, *"Green Helmets": A Conceptual Framework for Security Council Authority in Environmental Emergencies*, 17 MICH. J. INT'L L. 515, 523 (1996) (assessing that sovereign rights require the international coordination of the Security Council to engage in environmental management in addition to international peace and security); *see also* Mark Toufayan, *Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age*, 31 MICH. J. INT'L L. 307, 346 (2010) (discussing the coordination demands of international human rights law to overcome institutional inertia and compliance gaps and to achieve sovereign rights).

Concluding Observations

The review of how jurisdictions are implementing the standards of transparency and exchange of information is already in progress.[190] The review focuses on assessing whether a jurisdiction has the legal and regulatory framework in place to be able to comply with those standards, and whether that framework really works.[191] The standards of transparency and exchange of information are operationalized in 10 essential elements[192] and 31 aspects for purposes of the review.[193] In an ideal, compliant jurisdiction, "[t]he information must be available, the tax authorities must have access to the information, and there must be basis for exchange. If any of these elements are missing, information exchange will not be effective."[194]

A government may wish to consider the implications of the following courses of action in working toward the implementation of the international tax standards on exchange of information:

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190. *See* OECD: BRIEF 2 (2011), http://www.oecd.org/dataoecd/11/57/46084660.pdf (stating that the Global Forum's 10 new peer review reports on exchange of information show progress made in the reviewed jurisdictions); *see also* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES: STATEMENT OF OUTCOMES 2 (2010), http://www.oecd.org/dataoecd/1/49/46107244.pdf (acknowledging the progress of the Global Forum in assessing participating jurisdictions' implementation of the standards of transparency and exchange of information).

191. *See* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES PEER REVIEWS: GUERNSEY 2011: PHASE 1: LEGAL AND REGULATORY FRAMEWORK 5 (2011), http://browse.oecdbookshop.org/oecd/pdfs/browseit/2311021E.pdf (explaining that the Global Forum reviews the quality and practical implementation of jurisdictions' legal and regulatory framework for the exchange of information); *see also* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES PEER REVIEWS: TRINIDAD AND TOBAGO 2011: PHASE 1: LEGAL AND REGULATORY FRAMEWORK 5 (2011), http://browse.oecdbookshop.org/oecd/pdfs/browseit/2311051E.pdf (informing that the Global Forum assesses whether jurisdictions are effectively implementing a legal and regulatory framework for the international standards of transparency and exchange of information).

192. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, IMPLEMENTING THE TAX TRANSPARENCY STANDARDS: A HANDBOOK FOR ASSESSORS AND JURISDICTIONS 73 (2010) (claiming that the Global Forum's review standards are divided among three broad categories and are broken into 10 essential elements); *see also* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, LAUNCH OF A PEER REVIEW PROCESS: NOTE ON ASSESSMENT CRITERIA 1 (2010), http://www.oecd.org/dataoecd/37/40/44824732.pdf (declaring that the Global Forum's standards of transparency and exchange of information are made up of 10 essential elements under three broad categories: availability of information, access to information, and exchange of information).

193. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, IMPLEMENTING THE TAX TRANSPARENCY STANDARDS: A HANDBOOK FOR ASSESSORS AND JURISDICTIONS 73 (2010) (noting that the Global Forum's standards of transparency and exchange of information incorporate 31 enumerated aspects that should be evaluated in a manner that promotes an efficient operation of the review process); *see also* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, LAUNCH OF A PEER REVIEW PROCESS: NOTE ON ASSESSMENT CRITERIA 2 (2010), http://www.oecd.org/dataoecd/37/40/44824732.pdf (maintaining that the Global Forum's review standards include 31 enumerated aspects and therefore, a rating system could take on a number of structures).

194. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, IMPLEMENTING THE TAX TRANSPARENCY STANDARDS: A HANDBOOK FOR ASSESSORS AND JURISDICTIONS 23 (2010) (concluding that a jurisdiction that complies with the Global Forum's standard for effective information exchange must have available information, accessible information to tax authorities and a basis for exchange); *see also* OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES PEER REVIEWS: PANAMA 2010: PHASE 1, at 9 (2010) (remarking that in order for the Global Forum to deem a jurisdiction like Panama compliant, tax information must be available, accessible and exchangeable).

Review existing legislation that could accomplish the goals of a TIEA and improve its promotion and implementation. Consider unilateral modifications of legislation or new legislation to achieve these goals. This must be a part of monitoring the agreed-upon information exchange standard anyway.[195]

Initiate negotiations of TIEAs with the most important trade partners. Negotiations must identify the legitimate uses of offshore centers and ensure that they could be used or taken advantage of without generating significant inefficiencies in the global financial system. The protection of legitimate financial privacy as a constitutional and transnational value as well as a human rights value should be ensured in these negotiations. As an illustration, a government could follow the model of the 2009 Liechtenstein Declaration by the government of the Principality of Liechtenstein.[196] Consider declaring unilaterally that the competent authorities will honor information requests by certain countries and establish the criteria and procedures for those requests based on an emergent customary norm of international law.

The success of government with an offshore financial center depends greatly in how well and how fast its legislative and regulatory framework becomes sensitive to the needs of global finances. Thus, in addition to these steps, a government would also be well advised to initiate and increase its participation in international entities with standard setting capabilities on taxation issues. It should also encourage the preparation of a truly global, multilateral double-taxation treaty that would take into account the interests and needs of every society. In other words, it should become an effective voice for using the instrument of taxation for furthering global fairness and equality.

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195. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCH. OF INFO., LAUNCH OF A PEER REVIEW PROCESS, TERMS OF REFERENCE, TO MONITOR AND REVIEW PROGRESS TOWARDS TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES 12 (2010), http://www.oecd.org/dataoecd/37/42/44824681.pdf (indicating the Global Forum will monitor implementation of exchange of information standards by the review of tax information exchange agreements to determine whether they meet such standards); *see also* Anthony McFarlane & John Ridgway, *Australia: Vanuatu Improves Transparency With International Company Reforms—Registration of Bearer Shares*, MONDAQ BUS. BRIEFING, Dec. 12, 2010, http://www.mondaq.com/australia/article.asp?articleid=117914 (stating that Vanuatu's legal structure will be analyzed under the Global Forum's peer review process to assess whether it satisfies regulations on the exchange of information).

196. See OECD, THE LIECHTENSTEIN DECLARATION (Mar. 12, 2009), http://www.oecd.org/dataoecd/47/42/42826280.pdf:

> Through this Declaration, Liechtenstein commits to, and will implement, global standards of transparency and exchange of information as developed by the OECD and will advance its participation in international efforts in order to counteract non-compliance with foreign tax laws. With this Declaration, Liechtenstein clarifies its position regarding privacy and banking secrecy and confirms its readiness to speed up the negotiation of tax information exchange and other agreements with a view to having a network of such arrangements in place as soon as reasonably possible in order to address the global issue of tax fraud and tax evasion as well as double taxation. In this process, Liechtenstein will emphasise its responsibilities to address both the tax claims of other jurisdictions and the trust of its clients.

See also Larisa Wick, Note, *Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria*, 12 MICH. ST. J. INT'L L. 63, 81–82 (2003) (indicating that OECD guidelines for multi-national corporations doing business in offshore jurisdictions acknowledge the importance of considering economic benefits as well as the local community and its development, so as to respect human rights when conducting business in host countries).

Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare

Tony Rock*

I. Introduction

On a winter's afternoon in February 2002, three men ascended a mountain near the Afghan city of Khost. Standing outside a series of caves, the men appeared to be talking. At 5'11", Daraz Khan was the tallest of the three and may have been treated with a degree of deference by the other two. What the men talked about, or whether Khan was actually acting in some sort of leadership capacity, we will never know. As the men talked, a Predator unmanned aerial vehicle (UAV)[1] observed their activities from the skies. Believing that the tall Khan could be the 6'4" Osama bin Laden, the CIA operative controlling the UAV launched one of the Predator's Hellfire missiles. The missile attack killed the three Afghani men.[2]

The Pentagon originally claimed the men were al Qaeda members, but poor weather and the site's geographic isolation thwarted the military's initial efforts to verify this information.[3] Reports soon emerged, however, that these three men were poor villagers, unaffiliated with terrorists or Islamic militants; the men had gone up the mountain hoping to collect scrap metal.[4]

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1. *See* U.S. Air Force, *MQ-1B Predator*, http://www.af.mil/information/factsheets/factsheet.asp?id=122 (last visited Mar. 22, 2011) (describing the Predator). The unmanned plane is 27 feet long and weighs 1,130 pounds without weapons and fuselage tanks. Remote control of the plane is conducted by a pilot, sensor operator, and mission intelligence coordinator, using a combination of line-of-sight piloting from the base and control via satellite uplink at other times. The Predator has a range of 454 miles, can fly at an altitude of 25,000 feet, and can carry up to two laser-guided Hellfire missiles.

2. *See* John F. Burns, *A Nation Challenged: The Manhunt; U.S. Leapt Before Looking, Angry Villagers Say*, N.Y. TIMES, Feb. 17, 2002, at A18 (stating that neither Osama Bin Laden nor other members of al Qaeda were among the victims of this airstrike); *see also* Doug Struck, *Casualties of U.S. Miscalculations; Afghan Victims of CIA Missile Strike Described as Peasants, Not Al Qaeda*, WASH. POST, Feb. 11, 2002, at A1 (noting that the victims were a mistaken target).

3. *See* Linda D. Kozaryn, *U.S. Following Up on Predator Strike; More Detainees Headed for GITMO*, American Forces Press Service, Feb. 8, 2002, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=43954 (last visited Mar. 22, 2011) (reporting that U.S. military officials cited bad weather as an excuse for why they still did not know the identities of the Khost airstrike victims).

4. *See* Burns, *supra* note 2, at 18 (adding that at about 3:00 P.M., as the three men were standing on a bluff above the Zhawara caves, the missile struck without warning from the seemingly clear sky); *see also* Roger D. Hodge, *Weekly Review*, HARPER'S MAGAZINE, Feb. 19, 2002 (commenting on the U.S. government's efforts to justify killing the men in Khost who were gathering metal scraps at the time of the attack).

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Four days after the attack, while admitting that the United States did not know the identities of the three men, a Pentagon spokeswoman still defended the attacks as legitimate.[5]

Eight years later, armed UAVs are an integral weapon in the war on terror.[6] The United States has used them in Afghanistan,[7] Iraq,[8] Yemen,[9] and Pakistan.[10] The extent to which UAVs play a role in U.S. combat operations invites inquiry into the legality of the attacks themselves under international law.[11] Accordingly, this article will assess the international legality of current U.S. UAV operations by placing them in the context of already existing scholarship on past attacks. I argue that the UAV attacks, while increasingly utilized to wage the war on terror, remain subject to rigorous legal review that properly balances promoting military interests and limiting civilian casualties. As a result, I conclude that most U.S. UAV attacks are legal as a matter of both *jus ad bellum* and *jus in bello*.

Part II.A. introduces the reader to UAV attacks, providing a brief introduction to the modern use of UAVs as well as information on early UAV attacks in the war on terror; section II.B. provides a background on the laws of warfare, places the war on terror within this frame-

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5. *See* Burns, *supra* note 2, at 18 (quoting the Pentagon's top military spokesperson: "[T]he initial indications afterwards would seem to say that these are not peasant people up there farming."); *see also* Tom Bowman, *Pentagon Defends Afghanistan Attack*, BALTIMORE SUN, Feb. 12, 2002, at 3A (stating that there was no indication the victims were innocent individuals).

6. *See U.S. Airstrikes in Pakistan Called "Very Effective,"* CNN, May 18, 2009, *available at* http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes (last visited Mar. 22, 2011) (Speaking about Pakistan, CIA Director Leon Panetta described UAVs as "the only game in town.").

7. *See supra* notes 1–4 and accompanying text; *see also* Diana Lee, *Heavy Civilian Casualties After Drone Attacks*, UNIORB, May 10, 2008, http://uniorb.com/RCHECK/drone.htm (last visited Mar. 22, 2011) (Stating that the United States has used Afghanistan as testing grounds for the Pentagon's efforts to perfect its high-tech robotic war weapons at the expense of thousands of innocent civilians); *see also* Eliza Szabo, *Fatal Neglect: Civilian Casualties in Afghanistan*, COUNTERPUNCH, Jul. 20, 2007, *available at* http://www.counterpunch.org/szabo07202007.html (last visited Mar. 22, 2011) (describing the frequent NATO airstrikes in Afghanistan that sometimes target Taliban insurgents, but that also frequently target innocent civilians in residential areas).

8. *See* Tom Vanden Brook, *Drone Attack Hit High in Iraq*, U.S.A TODAY, Apr. 29, 2008, at A1 (describing the UAV attacks in Iraq, specifically describing its capacity to fire missiles). *See, e.g.*, D. Clare, *California Air National Guard Embraces New Mission*, U.S. Air Force, Aug. 16, 2006, http://www.af.mil/news/story.asp?storyID=123025240 (last visited Mar. 22, 2011) (noting that one of Reconnaissance Squadron's UAVs had fired 59 Hellfire missiles during combat operations).

9. *See infra* notes 26–29 and accompanying text for information on the 2003 UAV strike in Yemen; *see also* Norman Polmar, THE NAVAL INSTITUTE GUIDE TO THE SHIPS AND AIRCRAFT OF THE U.S. FLEET 479 (2005) (explaining the CIA's usage of the UAV known as "the Predator" in Yemen that proved successful in launching missiles).

10. *See infra* II.C.1. for a discussion of U.S. UAV attacks in Pakistan; *see also* Committee on Conventional Prompt Global Strike Capability, U.S. CONVENTIONAL PROMPT GLOBAL STRIKE: ISSUES FOR 2008 AND BEYOND 22 (2008) (discussing the United States' utilization of UAVs to attack members of al Qaeda living in Pakistan).

11. The U.S. is a party to numerous treaties that limit its ability to wage war or engage in certain activities during warfare. Because of recognition of its international obligations, the United States' compliance with international law is a concern to both the U.S. and international community. *See* Armin Krishnan, KILLER ROBOTS: LEGALITY AND ETHICALITY OF AUTONOMOUS WEAPONS 97 (2009) (mentioning that the U.S. has an obligation under the Geneva Convention Additional Protocol I to assess the legality of autonomous weapons and their compliance with international law); *see also* Chris Jenks, *Complying and Flying: Legal and Technical Issues Related to the Operation of Unmanned Aerial Systems: Article: Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 650–51 (2009) (noting the controversy surrounding the reach of the United Nations Charter over the use of unmanned aerial systems).

work, and provides the legal community's reaction to early UAV attacks; and section II.C. explores the recent developments in UAV usage—specifically, the drone war in Pakistan, the increasing reliance on contractors for UAV operation, and the trend toward increasing autonomy for UAVs. Finally, part III explores the legality of UAV attacks as well as ways to resolve the various legal uncertainties accompanying UAV use.

II. Overview

A. UAVs Enter Modern Combat

1. The Dawn of the Unmanned Age

The UAV is hardly a creature of the 21st century. Depending on one's definition, the first use of UAVs may be attributed to aerial vehicles as old as 19th-century balloons loaded with explosives.[12] The State of Israel is typically credited with pioneering the current use of UAVs in a combat surveillance or attack role.[13] In 1982, Israel utilized UAVs in a surveillance as well as combat capacity.[14] On the surveillance side, the UAV collected visual and electronic information on Syrian surface-to-air missile (SAM) launch sites.[15] In a combat decoy capacity, the UAVs drew the fire of the Syrian SAMs, thereby allowing manned aircraft to destroy the SAM sites.[16] The United States adopted these UAV usage innovations,[17] and the new uses of UAVs would provide the U.S. military with a new tool in 21st-century combat operations.[18]

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12. *See* U.S. Centennial of Flight Commission, *Military Use of Balloons in the Mid- and Late-Nineteenth Century*, http://www.centennialofflight.gov/essay/Lighter_than_air/military_balloons_in_Europe/LTA4.htm (last visited Mar 22, 2011) (explaining the versatile usage of balloons during wartime in the 19th century).

13. *See* Mark Edward Peterson, *The UAV and the Current and Future Regulatory Construct for Integration into the National Airspace System*, 71 J. AIR L. & COM. 521, 545–46 (2006) (stating that the Israeli Defense Forces were further ahead in the development and usage of UAVs compared to other countries); *see also* Ralph Sanders, *An Israeli Military Innovation: UAVs*, 33 JOINT FORCE Q. 114 (2002) (crediting Israel with the maturity of UAVs to their current status despite other countries' experimentation with the systems).

14. *See* Sanders, *supra* note 13, at 115 (describing Israel's use of UAVs in surveying a security zone in Lebanon and their utilization of the unmanned vehicles in a conflict capacity).

15. *See* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 168 (2005) (referencing Israel's use of UAVs in Lebanon during 1982 for the purpose of destroying Syrian technology); *see also* Sanders, *supra* note 13, at 115 (explaining that UAVs had the capability to gather Syrian frequencies and thereby help Israel perform its combat function).

16. *See* Sanders, *supra* note 13 at 115 (indicating that Israel utilized UAVs in order to divert Syrian SAM missiles toward the drones); *see also* SpaceWar, *Israel Sells UAVs to Russia, on Condition*, June 26, 2009, http://www.spacewar.com/reports/Israel_sells_UAVs_to_Russia_on_condition_999.html (recalling Israel's use of UAVs in combat during the 1982 Israeli invasion).

17. *See* Sanders, *supra* note 13, at 115 (stating that Israel's success in using UAVs induced both U.S. military and intelligence agencies to adopt these same tactics).

18. *See infra* II.A.2.

2. Hellfire From the Skies

On September 17, 2001, President Bush famously declared that the United States wanted Osama bin Laden "dead or alive."[19] Twenty weeks later, with Taliban and al Qaeda forces already expelled from major Afghan cities,[20] the CIA thought it might have found bin Laden.[21] As described in the beginning of this article, the ensuing UAV attack resulted in the deaths of three Afghani villagers looking for scrap metal.[22] The Zhawar Predator attack was not the first time the United States armed a UAV with weapons, and it certainly would not be the last. The innovation of attaching Hellfire missiles to UAVs—combining reconnaissance and instant attack capabilities[23]—became a favorite new tool in the counterterrorism arsenal.[24] Less than a year later, the United States would use an armed Predator in the most controversial unmanned vehicle attack in the war on terror.[25]

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19. *See* David Sanger, *Bin Laden Is Wanted in Attacks, "Dead or Alive," President Says*, N.Y. TIMES, Sept. 17, 2001, at A1 (reporting that President George W. Bush seeks to bring Osama bin Laden to justice); *see also* Dan Balz, *Bush Warns of Casualties of War; President Says Bin Laden Is Wanted "Dead or Alive,"* WASH. POST, Sept. 18, 2001, at A1 (reporting that the president will seek out Osama bin Laden as part of the war on terror).

20. *See* Ayaz Gul, *VOA News Report—Afghan Fighting*, GlobalSecurity.org, Dec. 9, 2001, http://www.globalsecurity.org/military/library/news/2001/12/mil-011209-29caacd9.htm (last visited Mar. 22, 2011) (describing how Taliban and al Qaeda forces have allegedly gone into hiding in the mountainous region of Tora Bora).

21. *See* John F. Burns, *A Nation Challenged: The Manhunt; U.S. Leapt Before Looking, Angry Villagers Say*, N.Y. TIMES, Feb. 17, 2002, at A18 (reporting that a man with a tall build was killed when U.S. forces mistook him for Osama bin Laden); *see also* Matthew Nasuti, *Remembering Daraz Khan, the First Afghan Killed by a Hellfire Missile Fired by a CIA Predator Drone*, Kabul Press, Dec. 27, 2009, *available at* http://kabulpress.org/my/spip.php?article4438 (last visited Mar. 22, 2011) (explaining that Americans bombed Tora Bora, the area where Khan was walking, when they believed Osama bin Laden was hiding there).

22. Although news stories appear to resolve some of the important details, such as the identity of Tall Man Khan, exactly what transpired on the afternoon of February 4, 2002, has never been definitively resolved. The Pentagon initially stated that it believed the individuals killed were connected to al Qaeda and claimed that there had been several individuals protected by a security detachment. *See* Steve Vogel & Walter Pincus, *Weather Obstructing Survey of Missile Strike Site*, WASH. POST, Feb. 8, 2002, at A17. Four days after the attack, Pentagon officials admitted to not knowing the identities of those killed. *See id.* News reports emerged over the next several days that three men were killed, all poor peasants from or near the village of Zhawar. *See* Burns, *supra* note 21, at 18. The Pentagon pointed to English-language documents and weapons found in nearby caves as purported evidence that the men were not peasants. *See* Vernon Loeb, *Alleged Beating of Prisoners Sparks Inquiry; Military Defends Feb. 4 Missile Strike*, WASH. POST, Feb. 12, 2002, at A12. The evidence presented by the Pentagon, however, was easily explained by the fact that the Zhawar caves were a known former hideout for al Qaeda. *See* Steve Vogel, *Al Qaeda Tunnels, Arms Cache Totaled; Complex Believed Largest Found in War*, WASH. POST, Feb. 16, 2002, at A27. The Pentagon never presented any evidence to counter the various reports that the men killed were peasants.

23. *See* Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 380 (2003) (explaining that the marriage of the Hellfire missile and the UAV allows its operators to perform a sneak attack, delivering a powerful blow to the target without any forewarning); *see also Evolution of UAV Employed Missiles*, DEFENSE UPDATE (Mar. 2007), *available at* http://defense-update.com/features/du-1-07/armedUAVs_4.htm (last visited Mar. 22, 2011) (describing the interaction of a UAV and a Hellfire missile).

24. *See* John J. Klein, *Unmanned Combat Aerial Vehicles and Transformation*, JOINT FORCE Q., 109, 109 (Winter 2002–3) (quoting President Bush as saying that "[w]e're entering an era in which unmanned vehicles of all kinds will take on greater importance—in space, on land, in the air, and at sea"); *see also Evolution of UAV Employed Missiles*, *supra* note 23 (explaining that as of 2005, the most current Hellfire missile had been "optimized" for the Predator UAV by increasing the weapon engagement zone and increasing the machine's peripheral vision).

25. *See infra* notes 26–29 and accompanying text for discussion of the November 2002 Predator strike in Yemen.

In November 2002, the CIA once again unleashed the power of the Predator drone upon unsuspecting victims. This time the target was a high-value al Qaeda leader—Abu Ali al-Harithi, alleged planner of the 2000 attack on the U.S.S. *Cole*.[26] Yemeni police efforts against al-Harithi earlier in the year had failed. Since then, U.S. and Yemeni intelligence service members had conducted surveillance and tracked al-Harithi's whereabouts.[27] Al-Harithi was traveling by car in Yemen with five companions whom the United States suspected as being low-level al Qaeda operatives.[28] The CIA launched a Hellfire missile attack from a Predator drone, killing al-Harithi and his five companions.[29] Unlike the Predator attack in Zhawar, no reports emerged of mistaken identities or poor peasants collecting scrap metal.[30] The Yemen attack would, however, spark debates about the legality of such strikes and whether they may be considered assassinations or extrajudicial killings.[31]

B. Rules of War, Rules of Terror

1. Background: International Humanitarian Law (IHL)

The laws of war show that the unmanned planes flying overhead today do not operate within a legal vacuum. The laws governing warfare are known as international humanitarian law (IHL) or the law of armed conflict (LOAC). These laws may be broken down further into *jus ad bellum*, which governs the initial use of force,[32] and *jus in bello*, which covers ongoing

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26. *See* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 190–91, Aug. 21, 2004 (detailing the attack on the U.S.S. *Cole*); *see also* Evan Thomas & Mark Hosenball, *The Opening Shot*, NEWSWEEK, Nov. 18, 2002, at 48 (reporting that on October 12, 2000, al Qaeda operatives loaded explosives onto a small craft, pulled up to the docked U.S.S. *Cole*, and killed 17 U.S. sailors).

27. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur, Asma Jahangir, Submitted Pursuant to Commission on Human Rights Resolution 2002/36*, ¶ 39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (reporting that the Yemeni government claimed to have made several unsuccessful attempts at apprehending al-Harithi); *see also* Thomas & Hosenball, *supra* note 26, at 48 (asserting that the CIA prefers to let local police find terrorists in order to preserve deniability).

28. *See* W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 712 (2007) (noting that all six men in the car were suspected members of the al Qaeda terrorist network); *see also* Thomas & Hosenball, *supra* note 26, at 48 (remarking that one of the men in the car was an American, a fact the CIA was unaware of at the time the killing was ordered).

29. *See* Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 676 (2007) (noting that the U.S. military used a Predator drone to attack al-Harithi's car). *See, e.g.*, Thomas & Hosenball, *supra* note 26, at 48 (reporting that the CIA's initial cover story, that the explosion could have been construed as an accident or an attack by a rival clan, was debunked within hours).

30. *See* Maggs, *supra* note 29, at 676 (stating that the United States worked together with Yemen in planning and executing the attack on al-Harithi and the other men).

31. *See infra* notes 98–101 for Norman Printer's discussion of the legality of this attack; *see also* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 722–23 (2004) (noting that members of the international legal community disputed the United States' justification for the attack). *See e.g.*, ECOSOC, *supra* note 27 (expressing "extreme concern" over the precedent that extrajudicial killing in order to fight terrorism may set).

32. *See* Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 4 (2006) (defining international humanitarian law as the law of war); *see also* Nicholas Rostow, *Wall of Reason: Alan Dershowitz v. the International Court of Justice*, 71 ALB. L. REV. 953, 980 & n.92 (2008) (asserting that international humanitarian law is the same as the law of armed conflict).

combat operations.[33] These laws have developed through customary international law since the 18th and 19th centuries.[34] The Lieber Code of the United States, for example, codified the doctrine of "military necessity,"[35] a concept that remains a core principle of IHL.[36] IHL develops through both treaties and custom.[37] From the various texts and customs, several key principles of IHL (*jus in bello*) emerge with respect to combat operations.[38] In addition to military necessity, the other core tenets of IHL's *jus in bello* include discrimination (also referred to as "distinction") between combatants and noncombatants[39] and proportionality.[40] Though inter-

33. *See, e.g.*, Harris, *supra* note 32, at 4 (noting that the term "laws of armed conflict" is synonymous with the term "law of war"); *see also* Rostow, supra note 32, at 980 & n.92 (asserting that the term "international humanitarian law" is interchangeable with the term "the law of armed conflict").

34. *See* RETHINKING THE JUST WAR TRADITION 25–26 (Michael W. Brough et al. eds., 2007) (noting that the principles of *jus in bello* are meant to regulate battlefield conduct); *see also* Int'l Comm. of the Red Cross, *International Humanitarian Law: Answers to Your Questions* at 14 (2004), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf (last visited Mar. 22, 2011) (asserting that the provisions of *jus in bello* apply to warring parties); *see also* Evan Thomas & Mark Hosenball, *The Opening Shot*, NEWSWEEK, Nov. 18, 2002, at 48 (demonstrating the classification of al Qaeda by the United States before proceeding to take military action).

35. *See* The Lieber Code of 1863, Gen. Orders No. 100, § 14 (Apr. 24, 1863), *available at* http://www.civilwarhome.com/liebercode.htm (last visited Mar. 22, 2011) (defining military necessity as understood by modern civilized nations); *see also* Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT'L L. 1011, 1018–19 (2010) (providing examples of the strict limitations on the use of force under various articles of the Lieber Code).

36. *See* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 122–23 (2010) (explaining that the basic principles of IHL have remained unchanged since the 19th-century codification of the Lieber Code); *see also* Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 381 (2003) (providing examples of the U.S. armed forces abiding by the laws of war).

37. *See* William J. Fenrick, *Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities*, 30 B.C. INT'L & COMP. L. REV. 111, 111–12 (2007) (stating that IHL is developed primarily by treaties and custom); *see also* Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law Into Armed Conflict*, 194 MIL. L. REV. 1, 14 (2007) (discussing the process by which international humanitarian law develops).

38. Military operations must comply with *jus ad bellum* and *jus in bello* analyses to adequately conduct an investigation into a military action's legality. *See* Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L L. & FOREIGN AFF. 331, 333 (2003) (citing Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 906 (2002)). While this comment will consider the *jus ad bellum* and *jus in bello* arguments for UAV strikes, an in-depth study of those factors for every single UAV strike is beyond the scope of this article. Rather, this comment will assess UAV strikes in the aggregate, looking for common trends with respect to the initial justification for *jus ad bellum* as well as the legality with respect to military necessity, discrimination, and proportionality. This comment will, however, address specific instances where, as in the case of the 2002 Yemen strike, authorities differ in their analyses.

39. *See* DAVID KENNEDY, OF WAR AND LAW 87 (2006) (identifying the principle of distinction, both "between combatants and noncombatants" and "between military and nonmilitary objectives"). *See, e.g.,* Klug, *supra* note 36, at 381 (noting that "[t]he structure and effectiveness of the laws of war are premised firstly on making a clear distinction between combatants and non-combatants—only combatants and related facilities are considered legitimate targets of deadly force").

40. *See* William Bradford, *Barbarians at the Gates: A Post–September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 656–57 n.44 (2004) (assessing various definitions and interpretations of proportionality); *see also* Dakota S. Rudesill, Note, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 531–33 (2007) (listing proportionality as one of the four tenets of *jus in bello*).

national legal scholars do not always agree on the precise definitions and breadth of these three principles, further elaboration of the generally agreed-upon principles provides greater insight into their bounds and contours.

The doctrine of military necessity mandates that military actions and operations be justified by some sort of necessity related to the military objective.[41] The Lieber Code provides a widely used definition for military necessity: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war." Additional Protocol I to the Geneva Convention provides a similar definition:[42]

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[43]

This definition of military necessity parallels the bedrock principle that "[c]ivilian objects shall not be the object of attack or of reprisals."[44] Accordingly, while one may not target civilians specifically, "military necessity" does not mandate a zero-civilian casualty threshold for acceptable military objectives.[45] Rather, the focus for military necessity itself (temporarily setting aside the connection to proportionality, which is intertwined with military necessity) is

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41. *See generally* Bradford, *supra* note 40, at 655–56 n.43 (assessing various definitions and interpretations of proportionality). *See, e.g.*, Deborah D. Avant et al., *Book Annotations*, 43 N.Y.U. J. INT'L L. & POL. 211, 223 (2010) (suggesting military necessity admits cruelty only where the cruel act is rationally connected to victory in combat).

42. *See* the Lieber Code, *supra* note 35.

43. *See* Protocol Additional to the Geneva Conventions, Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (quoting the explanation for military objective attacks); *see also* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 423–29 (1987) (delineating which principles of Protocol I the U.S. supported).

44. *See* Protocol Additional to the Geneva Conventions, *supra* note 43, at art. 52(1) (establishing civilian object sanctuary from military attacks).

45. *See* Luis Moreno-Ocampo, *Office of the Prosecutor Letter to Senders Regarding Iraq* (Feb. 9, 2006), *available at* http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited Mar. 22, 2011) (noting that international humanitarian law permits attacks in proportion to military objectives, even if it is known that they will result in civilian casualties); *see also* Gregory S. McNeal, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5113, 5120–21 (2010) (stating civilian casualties are permitted if military forces mitigate with proportionality and military necessity).

whether the attack will offer some "definite" advantage based on the circumstances at the time of attack.[46] This means that the military advantage to be gained cannot simply be hypothetical or at some unforeseen time in the future.[47]

Some scholars argue for a broad interpretation of military necessity.[48] Under such an interpretation, the military has greater leeway in determining what constitutes military necessity (i.e., what activities are necessary to accomplish the military objective).[49] Under a narrow, or stricter, interpretation of military necessity, on the other hand, the military's activities are more closely scrutinized to determine whether they are in fact necessary to accomplish the military objective.[50]

The next key principle of IHL is discrimination between combatants and noncombatants. In short, this principle of the customary IHL requires that military actions distinguish between

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46. *See* Protocol Additional to the Geneva Conventions, *supra* note 43, at art. 52(2) (indicating that attacks on objects are limited to those objects that by their nature, location, purpose or use, effectively contribute to military action).

47. *See* Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 7 Y.B. INT'L HUMAN. L. 35, 41 (2004); *see also* J. Romesh Weeramantry, *State Responsibility—International Humanitarian Law—Diplomatic Immunity in Wartime*, 101 AM. J. INT'L L. 616, 625 (2007) (asserting that definite military advantage must be more than a hypothetical or speculative effect on war).

48. *See* Bradford, *supra* note 40, at 665 (asserting the abandonment of the International Criminal Court (ICC) by the United States in its military actions); *see also* BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 96 (2007) (exemplifying President Abraham Lincoln's adoption of a broad interpretation of military necessity).

49. *See* Bradford, *supra* note 40, at 666 (discussing the original, more permissive view of military necessity); *see also* Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT'L L.J. 179–82 (2007) (defining the two different approaches of the doctrine of military necessity).

50. *See* Bradford, *supra* note 40, at 666. Bradford identifies a trend toward the more restrictive view from the adoption of the Lieber Code through World War II. Specifically, Bradford identifies a World War II tendency to reject broader claims of military necessity. Bradford notes that by circumscribing the activities permissible under the military necessity doctrine, the narrow view may nullify military necessity itself: "For [some scholars], the proscription of so much conduct heretofore permissible has drained necessity of operational significance" (noting that "by World War II the range of actions considered permissible by necessity had narrowed"); *see also* Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law,* 28 B.U. INT'L L.J. 39, 113 (2010) (exploring whether a military attack is lawful against property through the definition of a military objective).

combatants,[51] noncombatants,[52] and not-target noncombatants.[53] Like military necessity, there are diverse ways to describe this principle. One description of discrimination is simply that "[s]tates must never make civilians the object of attack."[54] Similarly, one could concisely restate the principle as a simple command: "you just can't target civilians."[55] In modern warfare, distinguishing combatants and noncombatants is not always a straightforward analysis. Because fighting often takes place in areas populated with civilians, there is not always a clear line between acceptable military attacks that have unintended civilian casualties and attacks that do not distinguish between combatants and noncombatants.[56] Moreover, old or incomplete intelligence may lead one to believe a target is only a military facility when it is, in fact, a

51. *See* Int'l Committee of the Red Cross, *Clarifying the Notion of Direct Participation in Hostilities*, June 30, 2009, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/direct-participation-ihl-feature-020609 (last visited Mar. 22, 2011) (defining a combatant as someone who directly participates in an armed conflict); *see also* Thomas J. Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT'L L. 29, 47–49 (2009) (distinguishing lawful from unlawful combatants).

52. *See* Int'l Committee of the Red Cross, *supra* note 51 (defining a noncombatant as anyone who is not directly participating in an armed conflict); *see also* Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 210–11 (2005) (asserting that the use of a uniform is the basic distinctive mark between a combatant and a noncombatant).

53. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 257 (July 8) (emphasizing the importance of distinguishing between combatants and noncombatants). The ICJ noted: "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets." In that decision, the ICJ refused to adopt a per se rule that use of nuclear weapons would violate international law; *see also id.* at 262–63 (noting the difficulty of differentiating between civilian population and combatants); *see also* Richard J. Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 663, 664, 670 (2006) (defining the function of noncombatant immunity while listing justifications for a military strike against noncombatants).

54. *See* Legality of the Threat or Use of Nuclear Weapons, *supra* note 53, at 257 (emphasizing the importance of distinguishing between combatants and noncombatants); *see also* J.W. Crawford III, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 FLETCHER F. WORLD AFF. 101, 105 (1997) (stressing the relevance of discrimination and its history). *But see* Emmanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 482 (2002) (discussing the difficulty in choosing between attacking terrorists and avoiding the civilians among whom they hide, and claiming that "[i]n exceptional circumstances . . . a retreat [from the requirement to avoid harming civilians] may be legally and morally justified").

55. *See* DAVID KENNEDY, OF WAR AND LAW 147 (2006). William Bradford perceives an underlying current running throughout the various theories of distinction: "In practice, arguments about distinction center not upon whether civilians may be deliberately targeted, but rather whether targeting decisions that cause unintended civilian casualties are illegal. *See* William Bradford, *Barbarians at the Gates: A Post–September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 657 n. 45 (2004) (providing support for the assertion that unintentional harming of civilians is against the law). *But see* Benjamin J. Priester, *Who Is a "Terrorist?" Drawing the Line Between Criminal Defendants and Military Enemies,* UTAH L. REV. 1255, 1279–80 (2008) (asserting that the law is not violated when noncombatants are incidentally attacked).

56. *See* Joseph N. Madubuike-Ekwe, *The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts*, 11 ANN. SURV. INT'L & COMP. L. 29, 31 (2005) (explaining that it is difficult to distinguish civilians from combatants because soldiers wage wars on civilian territory). *See generally* Gross, *supra* note 54, at 482 (analyzing practices of distinction and circumstances in which civilian collateral damage may be acceptable or even necessary).

civilian facility or a dual-use facility used by combatants and noncombatants alike.[57] Where there are competing interests between military objectives and potential civilian casualties, the analysis progresses to proportionality.

The principle of proportionality requires that a military attack be appropriate in scope to the military objective.[58] Proportionality defies a simple definition because, as various legal scholars have noted, it does not consist of a simple punch-for-punch, shot-for-shot retribution standard.[59] Indeed, one could argue that a large-scale military operation in response to a kidnapping or rocket launches satisfies proportionality standards.[60] Ultimately, any proportionality analysis must assess whether the destruction of a particular target created a justifiable military advantage and will lead to differences in opinion.[61] That being said, one possible way to articulate proportionality is to define it as a balancing test between military advantage and

57. *See* Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 436–37 (2009) (describing a U.S. attack on a suspected Baath Party site in the first Gulf War, when in fact the site was used as an air raid shelter by civilians); *see also* Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 A.F. L. REV. 29, 49 n.142 (2007) (indicating that Israeli soldiers failed to minimize civilian loss because they deliberately struck an area with no military target).

58. *See* Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993) (noting that "[i]n the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy"); *see also* Arie J. Schaap, *Cyberlaw Editions: Cyber Warfare Operations: Development and Use Under International Law*, 64 A.F. L. REV. 121, 150 (2009) (defining the principle of proportionality as allowing the use of force as long as it does not exceed the military objective). These sources refer to proportionality in the *jus in bello* context. There is also an analysis for proportionality at the *jus ad bellum* stage, which addresses the military necessity of resorting to force in the first place. This article will focus primarily on proportionality in the *jus in bello* context.

59. *See* Bradford, *supra* note 55, at 657 n.44 (2004) (arguing that "it is difficult to assess whether the method and means are in fact 'conducive' to the end sought and not excessive in relation to that end"); *see also* William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 545 (1997) (demonstrating the difficulty of applying the principle of proportionality to a specific set of facts).

60. *See* Lionel Beehner, *Israel and the Doctrine of Proportionality*, Council on Foreign Relations, July 13, 2006, *available at* http://www.cfr.org/publication/11115/israel_and_the_doctrine_of_proportionality.html (last visited Mar. 22, 2011) (highlighting the flexibility the Israeli government has in choosing its response to soldier abductions, as long as there is a proper military objective); *see also* Michael N. Schmitt, *"Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127, 153 (2008) (implying that Israel's destruction of communication lines and control of the territory were proportionate to Lebanon's kidnappings and rocket attacks).

61. *See* Gardam, *supra* note 58, at 405 (recognizing the subjective nature of any proportionality analysis); *see also* Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT'L L. & POL'Y 265, 312 (2000) (emphasizing that people's different calculations of collateral damage make the proportionality analysis subjective).

collateral damage.[62] Thus, a disproportionate attack would be considered "any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[63] Proportionality, one must bear in mind, prohibits attacks that would cause *excessive* harm to nonmilitary targets. The principle of proportionality recognizes that there may be harm to civilians during the course of combat operations that have a legitimate military objective.[64] One commentator suggests that the very name "international humanitarian law," as opposed to "law of war," may lead to a prioritization of humanitarian factors at the expense of ignoring military factors when analyzing a military operation's legality.[65]

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62. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 57(2)(a)(iii), June 8, 1977 (prohibiting attacks that may be excessive compared to the anticipated military advantage); *see also* Saby Ghoshray, *When Does Collateral Damage Rise to the Level of War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 694 (2008) (explaining that the legality of the attack is evaluated by a balancing test that weighs the military advantage against the number of civilian deaths); *see also* Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 7 Y.B. OF INT'L HUMANITARIAN L. 35, 53 (2004) (noting that "[c]oncrete and direct military advantage factors into the proportionality equation by being balanced against expected incidental civilian losses").

63. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 57(2)(a)(iii), June 8, 1977 (defining proportionality); s*ee also* Beard, *supra* note 57, at 427 (identifying the Protocol I definition as the "most widely accepted definition of proportionality"); *see also* Symposium, *The Environmental Law of War*, 25 VT. L. REV. 653 (2001) (emphasizing that the concept of "excessive" in the definition of proportionality is the line between proportionate and disproportionate attacks).

64. *See* Beard, *supra* note 57, at 427 (explaining that proportionality, and thus the law of war, does not place on states an absolute prohibition against harming civilians during military attacks); *see also* Timothy L. McCormack & Paramdeep B. Mtharu, *Expected Civilian Damage and the Proportionality Equation*, ASIA PACIFIC CENTRE FOR MILITARY LAW, Nov. 2006, at 1, 2–3 (recognizing that, although International Humanitarian Law expressly prohibits discriminate non-military attacks, it is acknowledged as a fundamental law that incidental loss of civilian life or civilian property is an anticipated by-product).

65. *See* Holland, *supra* note 62 at 38 (noting that the terminology of International Humanitarian Law may delude some into believing that its only defined purpose is the protection of humanitarian values); *see also* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L. J. 365, 418 (2009) (noting that states' military objectives and obligations in a time of war are oftentimes gauged by a heavy stratum of humanitarian rights which are necessarily vested in individuals rather than in the state itself).

2. IHL and the War on Terror

On September 20, 2001, nine days after the terrorist attacks of September 11, President Bush told a joint session of Congress, "Our war on terror begins with al Qaeda, but it does not end there."[66] The phrases "War on Terror"[67] "and "Global War on Terror"[68] indicated that the United States viewed its anti-terrorist efforts as more than a simple policing operation.[69] Commentators contemplated the significance of Bush's declaration by asking first, whether the U.S. had the legal justification to engage in this "war," and second, whether the government wanted to consider its military actions constrained by the laws of war, as would happen in an "armed conflict" governed by IHL.[70]

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66. *See* Michael Isikoff, *War on Words: Why Obama May Be Abandoning Bush's Favorite Phrase*, NEWSWEEK, Feb. 4, 2009, *available at* http://www.newsweek.com/2009/02/03/war-on-words.html (last visited Mar. 22, 2011) (quoting the excerpt cited above from the speech of President George W. Bush on Sept. 20, 2001).

67. *See* President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001) (expressing that American retributive measures prospectively taken against al Qaeda will be classified as a "war on terror").

68. *See* President George W. Bush, Discussion of Global War on Terror (Sept. 5, 2006) (mentioning the use of the phrase "Global War on Terror," or GWOT, as common parlance throughout the Bush administration); *see also* Scott Wilson & Al Kamen, *"Global War on Terror" Is Given a New Name*, WASH. POST, Mar. 25, 2009, at A04 (declaring that contrary to the previously used term "Global War on Terror," in March 2009 the Obama administration began using the term "overseas contingency operations" to describe military efforts implemented to combat terrorism).

69. *See* Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 394 (2008) (maintaining that in the months after September 11, 2001, radical measures reflected the United States' belief that it would claim militaristic rights throughout the globe as though it were a de jure armed conflict); *see also* INTERROGATING THE WAR ON TERROR: INTERDISCIPLINARY PERSPECTIVES 7–8 (Deborah Staines ed., 2007) (describing the United States's war on terror as partly incentivized by economic gain and various retributive measures of punishment in addition to its general counterterrorism objective.).

70. *See* O'Connell, *supra* note 69, at 394 (declaring that the United States' objectives in its global war on terrorism was not specifically limited to targeted militaristic measures or al Qaeda itself); *see also* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POLICY 343, 344 (2010) (commenting that the existence of armed conflict is assessed by subjective criterion, and upon its determination, a nation's capacity to use lawful military force is then affirmed).

Determining the correct legal classification of the war on terror became difficult as U.S. operations against al Qaeda and other terrorists spread beyond the battlefields in Afghanistan and Iraq[71] to locales as diverse as Pakistan,[72] Yemen,[73] Somalia,[74] Italy,[75] and the Philippines.[76] One line of reasoning contends that the U.S. had the right to claim self-defense against al Qaeda, a non-state actor, in response to the "armed attack" sustained on September 11, 2001.[77] The justification for the war on terror is necessarily self-defense: the U.N. Charter prohibits war[78] except in self-defense in response to an "armed attack"[79] or by authorization of the Security Council.[80] After the terrorist attacks, there was no formal authorization for force by the Security Council. There were, however, resolutions condemning the attacks that reaffirmed the state's right to self-defense under Article 51 (i.e., after sustaining an armed attack).[81] The fact that the Security Council specifically mentioned the right to self-defense under the U.N. Char-

71. *See* Michael N. Schmitt, *Targeted Killing in International Law*, 103 AM. J. INT'L L. 813, 814 (2009) (reviewing NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008)) (indicating that the United States targets transnational terrorists beyond the battlefields of Afghanistan and Iraq). Whether the war in Iraq should be classified as part of the war on terror is, in itself, hotly disputed and debated. This comment will not address that debate, but does adopt the relatively uncontroversial position that the Iraq War is properly classified as an armed conflict for IHL purposes.

72. *See infra* II.C.1. for discussion of UAV strikes in Pakistan; *see also* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y, 101, 109 (2010) (showing how the United States has resorted to territorial intrusions vis-à-vis drone strikes in areas such as Pakistan, Somalia and Yemen).

73. *See supra* notes 26–29 and accompanying text for discussion of the 2002 Predator strike in Yemen; *see also* Scott Shane, Mark Mazzetti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1 (reporting on the recent U.S. air strike that hit a group of suspected al Qaeda operatives in Yemen).

74. *See* Julian Barnes & Edmund Sanders, *U.S. Chose Its Time in Somalia*, L.A. TIMES, Sept. 16, 2009, at A18 (discussing a U.S. military strike targeting an al Qaeda-linked suspect).

75. In the "Imam Rapito" affair, CIA agents allegedly kidnapped an Egyptian cleric and transferred him to Egyptian authorities for interrogation. *See, e.g.*, John Crewdson & Tom Hundley, *Rome Denies Prior Knowledge of Cleric's Kidnapping; Lawmakers Protest Alleged CIA Action*, CHI. TRIB., July 1, 2005, at C7 (recapping the incident and detailing Italian legal activities that ensued).

76. *See, e.g.*, Peter Brookes, *No Bungle in the Jungle: Operation Enduring Freedom—Philippines Is Getting Results*, ARMED FORCES J., Sept. 2007, at 12 (revealing U.S. counterterrorist operations in the Philippines).

77. *See* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 46–51 (2002) (concluding that the September 11, 2001, incident was an "armed attack" as defined by Article 51 of the U.N. Charter and therefore the United States was justified in exercising its inherent right to respond to such an attack); *see also* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 430 (2006) (arguing that the "considered view" is that the September 11, 2001 attacks constituted an "armed attack").

78. *See* U.N. Charter art. 2, para. 4 (indicating that Article 2(4) is the famed prohibition on the threat or use of force: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

79. *See* U.N. Charter art. 51 (allowing self-defensive action in the event of an armed attack against a member nation).

80. *See* U.N. Charter art. 42 (vesting power in the Security Council to use various armed forces to "maintain or restore international peace and security"); *see also* U.N. Charter art. 43 (requiring member nations to make available its armed forces to the Security Council for the purpose of "maintaining international peace").

81. *See* S.C. Res. 1373, ¶ 2, 4, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (condemning the September 11, 2001 terrorist attacks and reaffirming the inherent right of self-defense as stated in the Charter of the United Nations); *see also* S.C. Res. 1368, pmbl., ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (denouncing the September 11, 2001 attacks and recognizing the right of self-defense).

ter arguably evidences the Council's belief that the September 11, 2001, attacks constituted an "armed attack" under the U.N. Charter.[82]

Even if a state responds in self-defense to an armed attack, IHL governs combat operations only if the fighting constitutes an "armed conflict."[83] Given the typical inclination of governments to deny the existence of an armed conflict,[84] one might wonder why the United States would want to classify its war on terror as an "armed conflict." As noted, an "armed conflict" classification heralds the application of IHL.[85] Along with the restrictions of IHL come

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82. *See* Yoram Dinstein, *Humanitarian Law on the Conflict in Afghanistan*, Address Before the Proceedings of the 101st Annual Meeting of the American Society of International Law, *in* 96 AM. SOC'Y INT'L L. 23, 24 (Mar. 13–16, 2002) (concluding that the Security Council implicitly affirmed the position that the September 11, 2001, attacks constituted an armed attack); *see also* Norman Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 345–52 (2003) (arguing that non-state actors, such as terrorist organizations, are bound by the U.N. Charter because the Charter constitutes customary international law and its application to non-state actors promotes the ideal of international peace and security).

83. *See* Int'l Committee of the Red Cross (ICRC), *Advisory Service on Int'l Humanitarian Law, What Is International Humanitarian Law?* 1, 1 (2004), *available at* http://www.ehl.icrc.org/images/resources/pdf/what_is_ihl.pdf (last visited Mar. 22, 2011) (stating that "[i]nternational humanitarian law applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence"). *But see* Geoffrey Corn & Eric Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 825–27 (2008) (noting that the war on terror makes the existence of an "armed conflict" difficult to discern). Corn & Jensen argue that IHL should also be triggered by rules of engagement (ROE) permitting the U.S. military to attack a combatant based on his status as a member of a terrorist organization. The rationale for this policy proposal is explained:

> There is perhaps no better de facto indication of the existence of armed conflict than the authorization of status-based ROE. These ROE permit the application of destructive combat power based solely on the determination that the anticipated object of attack is associated with a group or entity that has been "declared hostile" by national authority. As a result, status-based ROE provide the most permissive and proactive source of target engagement authority available for military forces, limited only by the law of war itself. Thus, once such ROE are authorized, it is the law of war that ipso facto applies to regulate the use of combat power.

Corn & Jensen's model, in short, uses the military's real-life practices to make a practical determination of whether a de facto "armed conflict" exists, triggering the rules of IHL.

84. *See* Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 394–95 (2008) (noting that, "[f]or the most part, governments have preferred to deny being engaged in armed conflicts even when they plainly are"); *see also* Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon,* 33 AM. U. L. REV. 145, 157 (1983) (commenting that governments often deny the existence of armed conflicts in the context of non-international conflicts).

85. *See* O'Connell, *supra* note 84, at 394–95. O'Connell explains the series of events that follow the triggering of IHL:

> Once that threshold is crossed, international humanitarian law applies and domestic law is circumscribed. In international armed conflicts, the regular armed forces of a state become legitimate targets. In all armed conflict, the International Committee of the Red Cross (ICRC) may demand the right to visit detainees and to demand that certain standards applicable to detention are maintained.

These obligations accompanying a finding of "armed conflict" and the application of IHL, O'Connell continues, lead most countries engaged in conflicts within their territories to deny the existence of "armed conflict." *But see* Richard Murphy & Afsheen Radsan, *Due Process and Targeted Killing of Terrorists*, 32 CARDOZO L. REV 405, 416 (2009) (explaining that an "armed conflict" must exist for international humanitarian law to apply, and that such a classification is dependent on the factual situation on the ground).

expanded opportunities for U.S. combat operations: as O'Connell notes, "the right [*sic*] to kill without warning and detain without trial are far more limited in peacetime than during fighting amounting to armed conflict."[86]

Another line of thinking suggested that states do not have the right to claim self-defense against non-state actors.[87] From the lack of claim to self-defense flowed the conclusion that the United States was not in an armed conflict—that "the United States . . . declared an armed conflict where specialists doubted there was one . . . [and that the] expanded wartime rights to kill and detain were claimed in a way that appeared to violate international law."[88] The International Committee of the Red Cross (ICRC) hedged on the matter, noting that state force against a non-state actor "*may* amount to . . . armed conflict" depending on the intensity of the hostilities and their duration.[89]

Finally, another concept that must be part of any *jus ad bellum* analysis of the U.S. war on terror is exhaustion of alternatives.[90] Initially espoused by U.S. Secretary of State Daniel Web-

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86. *See* O'Connell, *supra* note 84, at 394–95 (highlighting some of the rights gained by acknowledging an "armed conflict"); *see also* Murphy & Radsan, *supra* note 85, at 409 (explaining that international humanitarian law grants a state broad authority to engage combatants in various ways).

87. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136, 194–95 (Jul. 9) (suggesting, though not definitively stating, that a state may not invoke a claim of self-defense against a non-state actor); *see also* Christian Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR. J. INT'L L. 963, 971 (2005) (stating that the right of self-defense is reserved for those acts committed by a state).

88. *See* O'Connell, *supra* note 84, at 395; *see also* Johannes van Aggelen, *The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims*, 42 CASE W. RES. J. INT'L L. 21, 35 (2009) (arguing that the national security strategy put in place after September 11, 2001, was an improper expansion of a state's right of self-defense).

89. *See* Gabor Rona, Presentation at Copenhagen Workshop on the Protection of Human Rights While Countering Terrorism: *When Is a War Not a War?—The Proper Role of the Law of Armed Conflict in the "Global War on Terror"* (Mar. 15–16, 2004), *available at* http://www.icrc.org/eng/resources/documents/misc/5xcmnj.htm (last visited Mar. 22, 2011) (analyzing, but not determining, whether the war on terror is an armed conflict); *see also* Printer, *supra* note 82, at 345 (discussing the premise that although non-state actors are generally not bound by the U.N. Charter, terrorist organizations should be seen as an exception).

90. This "exhaustion of alternatives" concept derives from Daniel Webster's "*Caroline* standards." *See* Amos Guiora, *Targeted Killing as Self-Defense*, 36 CASE W. L. RES. J. INT'L L. 319, 322 (2004) (stating that "[t]here also must be no reasonable alternative to the targeted killing, meaning that the international law requirement of seeking another reasonable method of incapacitating the terrorist has proved fruitless"); *see also* Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 612 (1995) (noting that the military action must be "a last resort in protecting against the threat").

ster in the *Caroline* incident,[91] the essential idea was that an act of anticipatory self-defense could be justified only if the need for self defense was "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[92] Webster's basic premise has developed into a principle of international law that requires exhaustion of alternatives before a targeted killing.[93] This principle extends to targeted killings, meaning that for a targeted killing to be legal, it must be a choice of last resort.[94]

3. Early UAV Strikes: The Legal Community Weighs In

Some legal scholars question the legality of UAV attacks, and the Yemen attack in particular. One noted, for example, that the Yemen attack, taking place outside of a designated battle-

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91. In December 1837, during a Canadian insurrection against British authority, a British ship fired upon a small steamer called the *Caroline* in New York waters. *See* The Avalon Project, *British-American Diplomacy: The Caroline Case*, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Mar. 22, 2011). The ship held Americans and Canadians, and several were killed during the British attack and destruction of the ship. *Id.* During the diplomatic exchange of letters that ensued, Webster laid out the standards that the United States believed must be met for an anticipatory self-defense attack to be legitimate. *Id.* These general standards also apply to non-anticipatory self-defense (i.e., self-defense in response to an attack). *See, e.g.*, Teplitz, *supra* note 90, at 574–78. The *Caroline* standard is a *jus ad bellum* benchmark for the right to resort to self-defense. Accordingly, it does not play a major factor in a typical *jus in bello*. This comment will incorporate the "exhaustion of other means" aspect of *Caroline* into the broader analysis of the legality of UAV strikes. The "exhaustion of alternatives" analysis plays an important role in the larger inquiry because, unlike traditional cases, I would argue there is a less clear delineation between *jus ad bellum* and *jus in bello* when the United States engages in counterterrorist activities in various countries throughout the world. As the case of al-Harithi in Yemen will demonstrate, a counterterrorist activity may cross a country's borders during only a single, isolated strike. That strike must satisfy *jus ad bellum* and *jus in bello*. Thus, in that case, I would argue that "exhaustion of alternatives" under *jus ad bellum* directly relates to whether you have a *legitimate* military objective under *jus in bello*. The relationship becomes more interesting where, as in the case of Pakistan, options are so limited that there may be *no* alternatives to exhaust before employing Predator drones.

92. *See* Letter from Daniel Webster to Lord Ashburton (April 24, 1841) (on file with the Yale Law School Library) *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Mar. 22, 2011); *see also* Mikael Nabati, *Anticipatory Self-Defense: The Terrorism Exception*, 102 CURRENT HIST. 222, 224 (2003) (discussing the *Caroline* standard for the preemptive use of force).

93. *See supra* note 90 for two examples of scholars applying the *Caroline* standard to modern combat operations; *see also* Laurie Calhoun, *Just War? Moral Soldiers?,* 4 INDEPENDENT REV. 325, 326 (2000) (defining the *jus ad bellum* condition of last resort as requiring the exhaustion of alternatives before using force); *see also* Joshua Raines, *Osama, Augustine, and Assassination: The Just War Doctrine and Targeted Killings*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 217, 235 (2002) (examining the prudential test and its requirement that peaceful alternatives should be looked to first).

94. *See* Guiora, *supra* note 90 (stating the principle that the legality of targeted killings will be based on whether they were a last resort); *see also* Peter Cullen, *The Role of Targeted Killing in the Campaign Against Terror*, 48 JOINT FORCE Q. 22, 27 (2008) (stating the premise that targeted killings should be a last resort).

field, may constitute "an extrajudicial killing in violation of both international and domestic law."[95] The U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions[96] went further, opining that "the attack in Yemen constitutes a clear case of extrajudicial killing."[97]

Norman Printer conducted an in-depth study of the Yemen attack,[98] noting that UAV attacks may be legal if they follow the traditional rules of necessity, proportionality, and distinction.[99] Printer concluded that members of al Qaeda are unlawful combatants,[100] and that the Predator strike complied with IHL.[101]

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95. *See* Brendan Gogarty & Meredith Hagger, *The Laws of Man Over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air*, 19 J. L. INFO. & SCI. 73, 95 (2008) (citing a U.N. Human Rights investigator's position that the Yemen attack violated international law as an extrajudicial killing); *see also* Heinz Klug, *The Rule of Law, War, or Terror*, WIS. L. REV. 365, 382 (2003) (indicating that a country violates domestic and international law when it uses force outside of the confines of war).

96. *See* Nigel S. Rodley, *United Nations Action Procedures Against "Disappearances," Summary or Arbitrary Executions, and Torture*, 8 HUM. RTS. Q. 700, 715–16 (1986) (describing the U.N. Special Rapporteur's position and how it was created); *see also The U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, Center for Human Rights and Global Justice, New York University School of Law, *available at* http://www.extrajudicialexecutions.org/about (last visited Mar. 23, 2011) (follow "About" hyperlink; then follow "About the Mandate" hyperlink) (listing the Special Rapporteur's responsibilities and how he or she is to fulfill those duties). The U.N. Special Rapporteur is a position created by the U.N. General Assembly. The Special Rapporteur carries out his mandate by conducting fact-finding missions, engaging in correspondence with governments, and attempting to hold governments accountable for extrajudicial killings.

97. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Civil and Political Rights, Including the Question of Disappearances and Summary Executions, *Report of the Special Rapporteur, Ms. Asma Jahangir, Submitted Pursuant to Commission on Human Rights Resolution 2002/36*, ¶39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (stating the Special Rapporteur's position on the U.S. attack in Yemen); *see also* Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 331 (2003) (discussing the Special Rapporteur's report on the Yemen attack and her position on the issue).

98. *See* Norman Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L L. & FOREIGN AFF. 331, 332–33 (2003) (discussing various public responses, some critical and some more measured, to the strike); *see also* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 171–73 (2005) (focusing on the U.S. Predator attack in Yemen and whether it complies with international regulations).

99. *See* Printer, *supra* note 98, at 379–81 (describing the military concepts and whether the UAV attack in Yemen satisfied those requirements); *see also* JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 1–3 (2004) (clarifying the concepts of necessity and proportionality in justifying the use of force);

100. *See* Printer, *supra* note 98, at 371–73 (examining the requirements for one to be considered a lawful combatant and concluding that the al Qaeda members did not meet the stated requirements); *see also* Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L LAW 325, 327–29 (2003) (discussing lawful combatant status and finding that al Qaeda members are not lawful combatants).

101. *See* Printer, *supra* note 98, at 382 (finding that the U.S. attack was justified because it complied with *jus ad bellum* and *jus ad bello*); *see also* Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149, 153 (2006) (stating that the attack in Yemen complied with international law because the Yemeni government consented to it).

Meanwhile, Jonathan Ulrich examined the legality of targeted killings within the scope of the executive ban on assassinations and the war on terror.[102] Ulrich analyzed targeted killings in the context of traditional armed conflict law[103] as well as targeted killings in areas where no armed conflict currently exists.[104] Ulrich highlighted various advantages of targeting killings—including a reduced impact on the civilian population compared to a conventional military invasion[105] — and concluded that targeting killing of terrorists is lawful.[106]

C. The Legal Implications Deepen: Persistent and Emerging Challenges

1. Drone Wars in Pakistan

From 2006 to present, the United States has executed numerous unmanned combat attacks in Pakistan.[107] The legal implications of using UAVs in Pakistan differ from those

102. *See* Jonathan Ulrich, Comment, *The Gloves Were Never On: Defining the President's Authority to Order Targeting Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1030–31 (2005) (focusing the analysis of targeting killings in the Global War on Terror on the relation to the executive order banning assassinations). *See generally* William C. Banks, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. R. 667, 672–74 (2003) (discussing the context of the ban on assassinations and the implications on targeted killings). This comment, on the other hand, focuses on the customary IHL principles of military necessity, distinction, and proportionality, and the potential blind spots in compliance with IHL created by increased reliance on UAVs.

103. *See* Ulrich, *supra* note 102, at 1050–54 (describing that historically the targeting of individuals has been an undisputed element of war and military action); *see also* Ariel Zemach, *The Unpleasant Responsibilities of International Human Rights Law*, 38 DENV. J. INT'L L. & POL'Y 421, 422 (2010) (stating that human rights law permits targeted killing if the individual is personally dangerous, but the law of war allows targeted killing of combatants regardless of whether they are an individual danger).

104. *See* Ulrich, *supra* note 102 at 1056–62 (asserting that the war against terror is placed in a law enforcement framework by Amnesty International's position that the targeted killing of individuals who are not an immediate threat constitutes extrajudicial killing). *But see* Mary Ellen O'Connell, *The Choice of Law Against Terrorism,* 4 MCGEORGE J. NAT'L SECURITY L. & POL'Y 343, 360 (2010) (arguing that the U.N. Special Rapporteur rightfully found the 2002 strike in Yemen to be an unlawful extrajudicial killing, and that most countries do find such acts to be lawful under article 51).

105. *See* Ulrich, *supra* note 102, at 1053 (stating that the requirement of proportionality minimizes collateral damage and targeted killing is efficient since terrorist combatants often hide themselves in the civilian population). *But see* Mark Curtis, *Afghanistan Is Being Stifled by Military Operations*, GUARDIAN UNLIMITED, Feb. 19, 2011, at ¶ 9 (alleging that there has been an increase in the number of civilian deaths in Afghanistan, and that surveillance drones used for targeted killings mainly kill civilians).

106. *See* Ulrich, *supra* note 102, at 1063 (concluding that the use of targeted killing is not contrary to the legal or moral principles of the war against terrorism). *Contra* Tara Mckelvey, *Inside the Killing Machine; President Obama Is Ordering a Record Number of Predator Strikes*, NEWSWEEK, Feb. 21, 2011, at ¶ 23 (explaining that many scholars argue that CIA employees who pilot UAVs are civilians directly engaged in hostilities, making them "unlawful combatants" and subject to prosecution).

107. *See* TOM ENGELHARDT, THE AMERICAN WAY OF WAR: HOW BUSH'S WARS BECAME OBAMA'S 86 (2010) (stating that today when a target in Pakistan is found and agreed upon, the U.S. drone "pilot" no longer needs Pakistani permission to fire); *see, e.g.*, Bobby Ghosh & Mark Thompson, *The CIA's Silent War in Pakistan*, TIME, June 1, 2009, at 38 (focusing on the increased use of UAVs in Pakistan in President Bush's final months in office).

accompanying UAV use in Afghanistan or Iraq because, in the latter cases, there is a recognized war zone.[108] In Afghanistan and Iraq, the U.S. military publicly recognizes the existence of a drone program and that the program is controlled by the military.[109] The drones the United States has operated in Pakistan, meanwhile, are part of a covert CIA operation "aimed at terror suspects around the world, including in countries where U.S. troops are not based."[110] Legal issues raised by this program include: whether there is an "armed conflict" that implicates the laws of war;[111] if the laws of war do apply, whether the UAV attacks comply with those laws; [112] and the international legal status of civilian contractors who operate UAVs.[113]

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108. *See* Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 36 (suggesting that the United States runs two drone programs, one in Afghanistan and Iraq run by the military that is an extension of conventional warfare, and one by the CIA that is not). *See generally* Jordan J. Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (exploring whether the legality of Predator drone use depends on the establishment of a recognized international or non-international armed conflict).

109. *See* CONFLICT, SECURITY AND THE RESHAPING OF SOCIETY: THE CIVILIZATION OF WAR 95 (Alessandro Dal Lago & Salvatore Palidda eds., 2010) (stating that U.S. drones in Afghanistan are responsible for intelligence, surveillance and missile attacks and are using a "shock and awe" method against the Taliban); *see also* Mayer, *supra* note 108, at 36 (explaining that the military's drone programs in Afghanistan and Iraq are publicly acknowledged).

110. *See* Mayer, *supra* note 108, at 36 (stating that the CIA program was initiating by the Bush Administration and continued by the Obama Administration); *see also* Mark Mazzetti & Salman Masood, *Cover Blown, C.I.A. Chief Has to Quit Pakistan*, N.Y. TIMES, Dec. 18, 2010, at A1 (asserting that the CIA has been expanding its covert war in Pakistan using armed drones against militants).

111. *See* Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 395 (2008) (describing the post–September 11, 2001 difficulty of determining whether an armed conflict existed because of the lack of a clear definition); *see also* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 A.J.I.L. 1, 3–4 (2004) (stating that the wide variety of opinions by legal scholars on the September 11, 2001, response evidenced the difficulty and complexity in determining whether an international armed conflict existed).

112. *See* Mayer, *supra* note 108, at 36, 42 (noting that "[m]any lawyers who have looked at America's drone program in Pakistan believe that it meets these basic legal tests"); *see also* CNN, *Pakistan Acknowledges U.S. Drone Strikes Targeting Militants*, *available at* http://www.cnn.com/2011/WORLD/asiapcf/03/10/pakistan.drone.attacks (last visited Mar. 18, 2011) (stating that U.S. officials claim the drone strikes in Pakistan are legal).

113. *See* Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 417–19 (2009) (noting that modern warfare, including the use of UAVs and civilian pilots, has resulted in greater reliance on lawyers to ensure compliance with the law of war); *see also* Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*?, 51 A.F. L. REV. 130–31 (2001) (stating the need for clearer guidance regarding civilians that perform military activities because of the risk that they will be accused of violations of the law of war or foreign domestic law).

The rate of drone attacks in Pakistan has rapidly increased: whereas the United States launched only 9 attacks in 2004–7, it launched more than 80 in the next two years and 118 in 2010.[114] U.S. officials typically refuse to comment on the Predator strikes in Pakistan,[115] and Pakistani officials do not confirm whether the United States has Pakistani permission for the attacks.[116] Unlike Afghanistan, the United States does not have an official ground presence in Pakistan.[117]

The secrecy of this program has made hard facts difficult to come by.[118] Reports vary widely in their accounts of the attacks: one report suggests that 91 civilians have died,[119] total-

114. *See* Greg Millar, *Drones Hitting Fewer Top Targets*, WASH. POST, Feb. 21, 2011, at A01 (explaining that there were 118 drone strikes this year, and that number of strikes has increased under the Obama administration); *see also* Peter Bergen & Katherine Tiedemann, *Revenge of the Drones*, NEW AMERICAN FOUNDATION, Oct. 19, 2009, *available at* http://www.newamerica.net/publications/policy/revenge_of_the_drones (last visited Mar. 23, 2011) (stating that there were six UAV strikes in the first six months during the Bush administration, and President Obama authorized an increase in the number of strikes); *see also The Year of the Drone*, NEW AMERICAN FOUNDATION, Jan. 10, 2011, *available at* http://counterterrorism.newamerica.net/drones (last visited Mar. 23, 2011) (stating that there have been 224 reported UAV strikes in Pakistan between 2004 and 2011).

115. *See Suspected U.S. Drone Strike Kills Three in NW Pakistan*, VOICE AM. NEWS, Feb. 24, 2011 (asserting that U.S. officials refuse to comment publicly on missile strikes in Pakistan and that experts speculate that the strikes are being carried out by unmanned drones); *see also* R. Jeffrey Smith et al., *Two U.S. Airstrikes Offer a Concrete Sign of Obama's Pakistan Policy*, WASH. POST, Jan. 24, 2009, at A1 (noting that Obama's press secretary refused to comment on a Predator strike in Pakistan that allegedly killed at least 20 people); *see also Deaths Rise in Alleged Drone Attack*, CNN, Sept. 25, 2009, *available at* http://www.cnn.com/2009/WORLD/asiapcf/0924/pakistan.attack/index.html (last visited Mar. 23, 2011) (explaining that usually officials decline to comment on drone strikes).

116. *See, e.g.*, *CIA Aircraft Kills Terrorist*, ABC NEWS, May 13, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=755961 (last visited Mar. 23, 2011) (discussing a 2005 CIA Predator attack in Pakistan and reporting that "it [was] unclear whether the Pakistanis approved of the action in advance"). *But see* Ehtesham Toro, *New Manner of Drone Attacks: Now the Motorbikes and Vehicles Are Being Targeted*, JANG, Jan. 27, 2011, *reprinted in* BBC, Jan. 29, 2011 (asserting that U.S. drone attacks in Pakistan continue unabated because the Pakistani government has allowed the United States to carry out the drone attacks).

117. *See* Mayer, *supra* note 108, at 36, 42 (noting that the CIA drone program targets terrorists "in countries where U.S. troops are not based"); *see also* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 130 (2010) (arguing that although there is no official U.S. ground presence in Pakistan, the border areas of Pakistan should be considered part of the "Afghanistan theater of conflict").

118. *See* Raza Khan, *Air Strikes by Drones Effective in Waziristan; Insurgent Unnerved, Disrupted by Attacks*, WASH. TIMES, Jan. 17, 2011, at A1 (speculating that if there is a secret agreement between Pakistan and the United States on drone attacks, it might be based on drone strikes that have allegedly killed top Pakistani militant commanders); *see also Two Drone Attacks Kill 15 in NWA*, FIN. DAILY, Jan. 2, 2011 (stating that the U.S. drone campaign in Pakistan is covert, but cables released from WikiLeaks have recently revealed that the Pakistani prime minister allowed the strikes).

119. *See* Ken Dilanian, *CIA May Be Tempering Its Drone Use*, L.A. TIMES, Feb. 22, 2011, at A9 (stating that U.S. officials claim that no civilians have been killed in the more than 75 strikes that have been launched since August 22, 2010); *see also* Bill Roggio & Alexander Mayer, *A Look at U.S. Airstrikes in Pakistan Through September 2009*, THE LONG WAR J., Oct. 1, 2009, *available at* http://www.longwarjournal.org/archives/2009/10/analysis_us_airstrik.php (last visited Mar. 23, 2011) (asserting that the civilian death toll has been low, and only 94 civilians have been killed between 2006 and 2009).

ing 9.1% of the total killed; another suggests that over 600 civilians have been killed,[120] or close to 90% of the total killed.[121] Other reports—including one by Peter Bergen and Katherine Tiedemann that relies only on major news source reporting to derive figures—put the number somewhere between these extremes.[122] Accordingly, one possible conclusion to draw is that the Predator drone attacks do not represent a proper deliberation of military necessity, distinction, or proportionality.[123]

Indeed, such a claim is made by Mary Ellen O'Connell.[124] She contends that, first and foremost, the United States lacks a justification to launch attacks in Pakistan. This is because, she claims, there was not an "armed conflict" until 2009, and because Pakistan has never expressly invited the United States to assist its counterterrorist operations.[125] Even if there were a justification for the commencement of operations, O'Connell contends that the U.S. attacks within Pakistan are disproportionate because of the high number of non-combatant casual-

120. *See Obama Doctrines Drone Murders: Bloody Blowback Inevitable*, RUPEE NEWS, Apr. 12, 2010 (stating that Pakistani official statistics show that an average of 58 civilians were killed every month in 2009 with a total of over 700 civilians killed that year); *see also* Daniel L. Byman, *Do Targeted Killings Work?*, BROOKINGS INSTITUTE, July 14, 2009, *available at* http://www.brookings.edu/opinions/2009/0714_targeted_killings_byman.aspx (last visited Mar. 23, 2011) (asserting that it is more than likely that more than 600 civilians have been killed and approximately 10 civilians died for every one militant killed); *see also* Amir Mir, *60 Drone Hits Kill 14 al-Qaeda Men, 687 Civilians*, THE NEWS, Apr. 10, 2009, *reprinted in* BBC, Apr. 10, 2009 (estimating the total number of civilian deaths to be 687 and arriving at this conclusion by subtracting the number of al Qaeda leaders killed from the total number of reported deaths).

121. *See* Jason Ditz, *Report Shows Major Civilian Toll in U.S. Drone War in Pakistan*, Antiwar.com, Dec. 9, 2010 (stating that more than 700 civilians have been killed, making civilians the majority those killed by U.S. drone strikes); *see also* Mir, *supra* note 120 (alleging that the U.S Predator strike success percentage does not exceed 6%, with 687 civilian deaths, and only 14 al Qaeda leaders).

122. *See CIA Drone Guy Becomes New Top Spy [Espionage]*, GIZMODO, July 21, 2010 (stating that one study estimated that one-third of drone fatalities were civilians, while another study estimated the deaths to be around 4%); *see also* Peter Bergen and Katherine Tiedemann, *Revenge of the Drones*, NEW AMERICAN FOUNDATION, Oct. 19, 2009, *available at* http://www.newamerica.net/publications/policy/revenge_of_the_drones (last visited Mar. 23, 2011) (estimating the total number of civilians killed to be between 250 and 320, or between 31% and 33%); *see also The Year of the Drone*, *supra* note 114 (stating that according to research by the New American Foundation, since 2006 approximately 21% of fatalities were civilians, and in 2010 the percentage was around six).

123. *See infra* notes 226–47 and accompanying text for an analysis of whether these attacks comply with IHL; *see also* Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations From Afghanistan Into Pakistan*, 84 INT'L L. STUD. 1, 19 (2009) (supporting the theory that the U.S. Predator drone attacks in Pakistan are illegal); *see also* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 274 (2010) (describing the elements of necessity and proportionality, and why the attacks in Pakistan did not meet either requirement).

124. Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004–2009, 2 (Notre Dame Law Sch. Legal Studies Research Paper No. 09-43, 2010), *available at* http://ssrn.com/abstract=1501144 (last visited Mar. 23, 2011) (concluding that the use of drones breaches international law norms); *see also* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 543 (2002) (affirming that the United States did not have the Pakistani government's consent to go forward with the drone attacks).

125. *See* O'Connell, *supra* note 124, at 16–18 (acknowledging that Predator drones have been launched from within Pakistan with some Pakistani cooperation but focusing on the lack of *express* invitation to the United States for assistance); *see also* Laurie R. Blank & Benjamin R. Farley, *Characterizing U.S. Operations in Pakistan: Is the United States Engaged in an Armed Conflict?*, 34 FORDHAM INT'L L.J. 151, 182-83 (2010) (highlighting the Pakistani government's disapproval of the U.S. attacks in their public statements, but noting that the government may have consented to the campaign internally).

ties[126] and lack military necessity because they "fuel[ ] the interest in fighting against the United States."[127]

Others, however, have indicated that the drone attacks in Pakistan are likely legal.[128] For example, Kenneth Anderson staunchly supported the Predator strikes under the principle of self-defense.[129] He also called upon the Obama administration to publicly justify the drone attacks.[130] Soon thereafter, President Obama's legal adviser Harold Koh defended the drone program as compliant with IHL.[131]

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126. *See* O'Connell, *supra* note 124, at 24 (emphasizing the high number of civilian deaths and the lack of proportionality in the U.S. attacks in Pakistan); *see also* Sikander Ahmed Shah, *War on Terrorism: Self-Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 114 (2011) (noting the significant number of civilian casualties as a result of U.S. drone attacks in Pakistan). For estimating the number of civilian deaths, O'Connell does not make a distinction between militants and non-militants. Rather, she considers anyone who was not the *specific* target of an attack to be an "unintended" casualty, regardless of whether they participate in hostilities. O'Connell, *supra* note 124, at 2–3 & n.4.

127. *See* O'Connell, *supra* note 124 at 24 (describing the absence of the principle of necessity in the U.S. drone attacks in Pakistan); *see also* Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 650, 666–68 (2010) (explaining the theories of proportionality and necessity, and the absence of necessity when U.S. forces conducted drone attacks in Pakistan).

128. *See* Shah, *supra* note 126, at 84 (describing supporters of the U.S. drone attack and their argument that the attack was based on the concept of necessity, and criticizing these approaches); *see also* Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 42 (noting that "[m]any lawyers who have looked at America's drone program in Pakistan believe that it meets [the] basic legal tests" of *jus in bello*).

129. *See* Kenneth Anderson, *Predators Over Pakistan*, WKLY. STANDARD, Mar. 8, 2010, at 27, 32, *available at* http://www.weeklystandard.com/print/articles/predators-over-pakistan (last visited Mar. 23, 2011) (arguing that the Predator drone attacks "fall within the traditional American legal view of 'self-defense' in international law," and that the "armed combat" justification was too narrow); *see also* Gregory S. McNeal, *Part I: Ten Questions: Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5113, 5119 (2010) (analyzing the self-defense argument for the U.S. drone attack in Pakistan).

130. *See* Anderson, *supra* note 129, at 27, 32 (emphasizing the need for the Obama administration attorneys and advisers to publicly support the U.S. drone attacks); *see also* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 105 (2010) (noting that there are senior officials of the Obama administration who have recently defended the drone attacks in Pakistan).

131. *See* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law, The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (last visited May 26, 2011) (arguing that U.S. attacks comply with IHL in the "ongoing armed conflict" against al Qaeda, the Taliban, and associated forces); *see also* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 442 (2010) (describing Harold Koh's speech and his explanation of why the drone attacks comply with international humanitarian law).

2. UAV Operators: The Contractor Combatant Status Dilemma

While any potential violations of IHL by UAV attacks warrant cause for alarm in and of themselves, such uncertainty multiplies in those cases where a civilian contractor operates the UAV.[132] The Third Geneva Convention established the guidelines under which one may be classified as a lawful combatant, thus enjoying the privileges of POW status.[133] The four criteria that determine whether a soldier or militia member obtains lawful combatant status are that he or she

1. Answers to a clear command structure;
2. Wears a uniform/insignia;
3. Bears arms openly;
4. Acts in accordance with the laws of war.[134]

Furthermore, a limited number of support contractors—for example, civilian members of military aircraft crews and supply contractors—may enjoy POW status.[135]

U.S. forces increasingly rely on contractors in the combat theater to perform activities that may be considered more active participation in hostilities.[136] One commentator notes that because only combatants complying with Geneva III enjoy protected POW status, a contractor

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132. *See infra* III.D. for discussion of the legal implications of contractor operation of UAVs; *see also* Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT'L L. 1011, n.257 (2010) (describing the risk that civilian contractors may be considered an illegal combatant when they operate drones); *see also* Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT'L SEC. L. & POL'Y 257, 291 (2008) (noting the great discretion civilians have when operating drones and the dangers that may result from an abuse of that discretion).

133. *See* Convention (III) Relative to the Treatment of Prisoners of War, art. 4(2) Aug. 12, 1949, 75 U.N.T.S. 135 (establishing guidelines for a combatant to be deemed a "prisoner of war"). This analysis merely indicates whether an individual may be classified as a lawful combatant under the Geneva Conventions. It does not determine whether a state allows an individual to participate in hostilities; that would be a state decision.

134. *See* Convention, *supra* note 133, at art. 4 (enumerating the requirements for one to be considered a "prisoner of war").

135. *See* Convention, *supra* note 133, at art. 4(2) (detailing the conditions to be met in order to meet "prisoner of war" status).

136. *See* Stephen M. Blizzard, *Contractors on the Battlefield: How Do We Keep From Crossing the Line?*, AIR FORCE J. LOGISTICS, Spring 2004, 1, 6. Blizzard explains the reasons for the increase:

> The trend toward the use of contractors in a theater can be attributed to four factors: deep cuts in military personnel; greater emphasis on privatization of functions that can be performed more efficiently outside the military; increased reliance on contractors because of the growing complexity and sophistication of weapon systems; and the lack of core military expertise, training, and flexibility gained by deploying contractors into theaters that have congressional, legislative, or host country-mandated troop ceilings.

Id. (citations omitted); *see also* Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,* 5 CHI. J. INT'L L. 511, 511–14 (2005) (noting the many areas civilian contractors are actively involved in such as maintaining weapons systems, conducting intelligence collections and interrogations).

who engages in "direct participation in hostilities" runs the risk of being an unlawful combatant.[137] Michael Guidry and Guy Wills take this analysis further, noting that the complexity of newly developed UAV technology suggests contractors will feature prominently in UAV operation for the foreseeable future.[138] Such a prediction proves problematic if one accepts the proposition that civilians (i.e., "noncombatants") may not legally participate in hostilities.[139] Indeed, those who unlawfully participate in hostilities may face charges for committing war crimes,[140] and, in some cases, an extension of the no-civilian principle might lead to a legal obligation on the state's part to conduct war only with Geneva-sanctioned combatants.[141]

Questions about the legality of UAV attacks, coupled with an uncertain legal status of contractors under the Geneva Conventions, create a doubly perilous quandary for the contractor operating the UAV. Amnesty International notes that it believes the UAV strike in Yemen may have been an extrajudicial killing.[142] Despite the United States' reasoned claim that its actions comported with IHL, Amnesty International insisted that an independent commission investigate all claims of extrajudicial killing.[143] Meanwhile, the United States has opposed ratification of the ICC in part due to fears that a politically motivated prosecutor might adopt a

137. *See* Blizzard, *supra* note 136, at 10 (arguing that a strict interpretation of "direct part in hostilities" could render contractors or aircraft maintenance personnel unlawful combatants); *see also* Michael Davidson, *Ruck Up: An Introduction to the Legal Issues Associated With Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 234, 245 (2000) (noting that when civilians bear arms in battle, they may be deemed combatants and are then subject to the concomitant legal consequences).

138. *See* Michael Guidry & Guy Wills, *Future UAV Pilots: Are Contractors the Solution?*, A.F. J. LOGISTICS, Winter 2004, at 7–9 (discussing contractors' increasingly important role in understanding complex UAV operations); *see also* Christophe Roach, *Robots in the Sky—The Legal Effects and Impacts of UAV on the Operational Commander* 1–17, 2 (2008) (stating that UAV technology relies heavily on contractor support).

139. *See* Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT'L L. 391, 421 (2010) (noting that many IHL scholars believe "that the combatant's right to participate in hostilities is exclusive"); *see also* Michael Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F.L. REV. 111, 116 (2001) (stating that civilians are not lawfully permitted to take part in hostile actions).

140. *See* Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act,* 48 B.C. L. REV. 699, 723 (2007) (examining a case in which a civilian contractor could have been charged with war crimes for his behavior at Guantanamo Bay); *see also* Watts, *supra* note 139, at 421 (citing an attempt by the United States to make such a claim of civilians committing war crimes by participating in hostilities).

141. *See* Vienna Convention on the Law of Treaties, art. 60, Jan. 27, 1980, 1155 U.N.T.S. 331 (explaining that a material breach will terminate any existing treaties); *see also* Watts, *supra* note 139 at 423 (identifying a possible Geneva-based restraint on "states' composition of their fighting forces").

142. *See* Amnesty International, *USA: An Extrajudicial Execution by the CIA?*, May 18, 2005, *available at* http://www.amnesty.org/en/library/asset/AMR51/079/2005/en/bcffa8d8-d4ea-11dd-8a23d58a49c0d652amr510792005en.html (last visited Mar. 23, 2011); *see also* U.N. Commission on Human Rights, *The Special Rapporteur's Report*, ¶ 37–9, U.N. Doc E/CN.4/2003/3 (Jan. 13, 2003) (stating that the UAV attack in Yemen was clearly an example of extrajudicial killing).

143. *See* Amnesty International, *supra* note 142 (instructing that an independent commission of inquiry be established to conduct a comprehensive review of potential abusive policies adopted during the "war on terror"); *see also* Amnesty International Priorities, *Issue Brief: Getting to the Truth Through an Independent Commission of Inquiry (2011) available at* http://www.amnestyusa.org/war-on-terror/page.do?id=1541004 (last visited Mar. 23, 2011) (calling for Congress to elect a non-partisan commission to evaluate the consequences of the war on terror).

line of thinking similar to Amnesty International's and usurp the United States' independent decisions to determine what practices violate IHL and warrant prosecution.[144]

Blizzard, Guidry, and Wills, recognizing the dilemma posed by the contractor's uncertain legal status, recommend a quasi-reserve program that would require contractors directly participating in operations to be reservists.[145] This solution—in effect, bringing the contractor into the chain of command—increases the probability of compliance with the laws of war for both the contractor and the commanding officer.[146] Guidry and Wills also note the possibility of IHL evolving over time to include classifications for contractors within the scope of combatants.[147] They reject this possibility as a solution for the foreseeable future, noting the slow way in which current IHL has developed.[148] However, they do discuss status of force agreements (SOFAs) as a means of preparation for deployment of military and contractor personnel to a combat theater.[149] The possibility for SOFAs to provide expanded protection to contractors is

144. *See* William Lietzau, *International Criminal Law After Rome: Concerns From a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119 (2001) (looking at a more in-depth analysis of U.S. fears of politically motivated prosecutions and U.S. concerns about the ICC); *see also* Patricia Wald, *Is the United States Opposition to the ICC Intractable?*, 2 J. INT'L CRIM. JUST. 19 (2004) (discussing the Bush administration's opposition to the ICC).

145. *See* Blizzard, *supra* note 136, at 13 (asserting that a concept of "sponsored reserve" serves both the function of maintaining needed military capacity while giving incentive to individuals with skills to compete for the positions); *see also* Guidry & Wills, *supra* note 138, at 12–13 (describing the function of the "sponsored reserve"). While both recognize the need to address contractor status, neither delves into the legal backdrop for why the exposure is significant. This comment analyzes their suggested solution as well as others, but does so specifically within the context of an analysis of the legality of UAV attacks.

146. *See* Guidry & Wills, *supra* note 138, at 13 (noting that the implementation of a "sponsored reserve plan" would eliminate the uncertainty associated with a contractor's legal classification and bring the person into "compliance with the Law of Armed Conflict"). *But see* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 184, 204 (2005) (advocating the preference of using civilian employees over civilian contractors because they are subject to greater control and supervision).

147. *See* Guidry & Wills, *supra* note 138, at 13 (noting that a new classification for contractors called "combatant contractor[s]" could be a possible solution to the ambiguous legal classification); *see also* Guillory, *supra* note 139, at 136–37 (proposing that a viable, but arguably difficult, solution to the dilemma posed by the contractor's uncertain legal status would be to clarify international law by adopting a "quasi-combatant status").

148. *See* Guidry & Wills, *supra* note 138, at 13 (commenting on the years it could take to statutorily create a "combatant contractor legal category"); *see also* Guillory, *supra* note 139, at 136–37 (recommending a clarification in the law as to the classification of contractors, but also noting that getting an international law implemented on a multinational basis is difficult).

149. *See* Michael Guidry & Guy Wills, *Future UAV Pilots: Are Contractors the Solution?*, 28 A.F. J. OF LOGISTICS 5, 13 (2004), *available at* http://www.aflma.hq.af.mil/shared/media/document/AFD-100120-040.pdf (last visited Mar. 23, 2011) (describing SOFAs as "necessary since they are legally binding, international agreements that create a legal status that, absent the agreement, would not otherwise exist"); *see also* CHUCK MASON, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED?, CONGRESSIONAL RESEARCH SERVICE, 1, 1 & n.3 (Jan. 5, 2011), *available at* http://www.fas.org/sgp/crs/natsec/RL34531.pdf (last visited Mar. 23, 2011) (explaining that a SOFA usually provides a "framework for legal protections and rights" for both U.S. military and civilian forces while they are in a foreign country).

not, however, presented by Guidry and Wills as a potential solution to the contractor dilemma.[150]

3. Increasing Prevalence of UAVs: Increasing Need for Scrutiny

The legality of UAV attacks is a particularly timely issue when one recognizes their increased prominence on the battlefield. Noted military journalist P.W. Singer recognizes an increased reliance on robots that is not limited to UAVs.[151] Indeed, Singer notes, problems stemming from autonomy in weapons systems can be traced back to the 1980s and the Navy's reliance on the Aegis anti-missile system's autonomous functions.[152] On multiple occasions in the past 20 years, the U.S. military has trusted autonomous weapons to make decisions that ultimately proved faulty.[153] With UAVs, however, the military notes that there is always a "man in the loop"—a human making the final decision to fire.[154]

Even if one were to accept the potentially mistaken idea that there will always be a "man in the loop" making the final decision to fire,[155] there is the larger impact of UAVs on war deci-

150. *See* Guidry & Wills, *supra* note 149, 12–14 (presenting three possible solutions to the problems arising out of ambiguous classification of contractors but not including an aggressive SOFA policy as one of them). *See generally* Eric Jensen, *The Laws of War: Past, Present, and Future: Combatant Status: Is It Time for Intermediate Levels of Recognition for Partial Compliance?*, 46 VA. J. INT'L L. 209, 212–13, 232–35, 248–49 (recommending the creation of an intermediate level of recognition for contractors under international law as the preferred solution to the ambiguity related to a contractor's legal status).

151. *See generally* PETER W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2009). *See generally* Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 411 (2009) (observing that the U.S. military has devoted many resources to technological developments, like "precision-guided munitions"). *See generally* Commander Andrew H. Henderson, *Murky Waters: The Legal Status of Unmanned Undersea Vehicles*, 53 NAVAL L. REV. 55, 55–57 (2006) (noting that many issues are raised when trying to classify unmanned undersea vehicles).

152. *See* Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395, 410–11 (2009) (describing the mistaken attack of a civilian airline which resulted from an Aegis system misidentification as an example of one of the many problems related to an autonomous weapons system); *see also* Peter W. Singer, *In the Loop? Armed Robots and the Future of War*, THE BROOKINGS INSTITUTION (Jan. 28, 2009), *available at* http://www.brookings.edu/articles/2009/0128_robots_singer.aspx (last visited Mar. 23, 2011) (explaining the lack of human decision making that occurs in the "semi-autonomous" Aegis anti-missile system).

153. *See* GOV'T ACCOUNTABILITY OFFICE, PATRIOT MISSILE DEFENSE: SOFTWARE PROBLEM LED TO SYSTEM FAILURE AT DHAHRAN, SAUDI ARABIA, GAO/IMTEC-92-96 (Feb. 1992), *available at* http://161.203.16.4/t2pbat6/145960.pdf (last visited Mar. 23, 2011) (explaining that a software problem caused the Patriot missile defense system to fail to track an incoming Scud missile which consequently hit an army barracks); *see also* Singer, *supra* note 152 (explaining the lack of human decision-making in the "semi-autonomous" Aegis anti-missile system and Patriot missile systems).

154. *See* Singer, *supra* note 152 (describing the role that humans play in operating UAVs).

155. *See id.* (opining that the temptation to have single operators control multiple unmanned weapons could lead to more robot autonomy). *See generally* Stephen E. White, Note, *Brave New World: Neurowarfare and the Limits of International Humanitarian Law* (2008), 41 CORNELL INT'L L.J. 177, 183–84 (2008) (noting that while increasing automation requires human involvement, advances in technology like jet engines require even more automation).

sion making. The dangers of increased reliance on UAVs are manifest, and well documented in P.W. Singer's *Wired for War*.[156] Singer describes how unmanned weaponry can affect the decision to go to war:

> Unmanned systems may lessen the terrible costs of war, but in doing so, they will make it easier for leaders to go to war. . . . Unmanned systems represent the ultimate break between the public and its military. With no draft, no need for congressional approval (the last formal declaration of war was in 1941), no tax or war bonds, and now the knowledge that the Americans at risk are mainly just American machines, the already lowering bars to war may well hit the ground. A leader needn't carry out the kind of consensus building that is normally needed before a war, and doesn't even need to unite the country behind the effort. Describes one air force officer none too happy with this trend, "Taking the human factor out of warfare cheapens the expense of combat and would lead to more conflict. Furthermore, that uniquely human concept of chivalry on the battlefield helps separate us from the beasts."[157]

Thus, the broader implications of UAVs on warfare and war decision making may be greater than most people recognize. A basic understanding of these effects is necessary before one can begin to present potential solutions to the problem.[158]

A significant effect of UAVs on combat decision making is the massive potential for increased deliberation, supervision, and evaluation of the decision to launch an attack.[159] Indeed, the ability of UAVs to loiter over a target may create a "greater possibility of meaningful legal review at all levels of authority."[160] Greater access to information also increases demands on military authorities to minimize casualties and creates greater humanitarian outcry

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156. *See generally* SINGER, *supra* note 151 (describing the various flaws related to the increased use of UAVs and other robotics in warfare).

157. *See id.,* at 319–20 (stating that the concept of chivalry is one of the things that separates humans from animals and beasts on battlefields).

158. *See* Elizabeth Bone & Christopher Bolkcom, Cong. Research Serv., Unmanned Aerial Vehicles: Background and Issues for Congress RL 31872, i, 19 (2003) (emphasizing the growing funding and support for UAVs in the United States); *see also* SINGER, *supra* note 151, at 385 (indicating how the International Committee of the Red Cross, one of the chief surveyors and experts in the laws of war, has not taken a position on UAVs).

159. *See* Implementation of the DoD Law of War Program, CJC 5810.01A (Chairman of Joint Chiefs of Staff Instruction. Aug. 27, 1999) (instructing that all operation plans are to be reviewed by the command legal adviser to ensure compliance with domestic and international law). *See generally* Beard, *supra* note 151, at 436–37 (describing how UAVs provide greater access to real-time surveillance, more opportunities for lawyers to review an attack, and more knowledge about the likely consequences of an attack).

160. *See* Beard, *supra* note 152, at 419 (stating that UAV technology provides for much higher chances of meaningful legal reviews); *see also* Michael Barkoviak, *Boeing UAV Able to Loiter Above Target for 10 Days,* DAILYTECH, *available at* http://www.dailytech.com/Boeing+UAV+Able+to+Loiter+Above+Target+For+10+Days/article19242.htm (last visited Mar. 23, 2011) (claiming that a new UAV is able to fly for up to ten days while conducting intelligence-gathering or attack missions).

when commanders authorize attacks with knowledge—provided by reconnaissance from the very UAVs carrying out the attacks—that civilian casualties are likely.[161] Of course, as part III shows, the greater access to information about UAV attacks only provides a different context for the legal community to disagree about the legality of the attacks.

III. Discussion: Contextualizing the Drone Attacks and Addressing the Contractor Dilemma

The legality of U.S. UAV attacks is reviewed in part III. The *jus ad bellum* against al Qaeda is reviewed in section III.A., arguing that a sufficient basis exists under the "armed conflict" framework to conduct military operations against the terrorist organization. Several factors that make the *jus in bello* of UAV attacks unique are identified in section III.B. A *jus in bello* analysis of armed UAV attacks for attacks in Yemen and Pakistan is conducted in section III.C. Finally, the possible solutions to the contractor dilemma, suggesting that creative practices might protect U.S. contractors from the legal liability of being unlawful combatants, are reviewed in section III.D.

A. The Case for *Jus ad Bellum* Against al Qaeda

After the events of September 11, 2001, President Bush declared a "War on Terror."[162] Scholars debated whether the U.S. actions were truly a "war" or, within international legal terms, an "armed conflict."[163] The difference between armed conflict and other conflicts is that, in former cases, IHL applies.[164] Armed conflicts can be broken down into two categories:

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161. *See* Beard, *supra* note 151, at 438–39 ("The perverse consequence of this new capability, not unnoticed by some human rights groups, is that civilian deaths in such attacks may be incidental but no longer are accidental."); *see also* David Glade, Air Force Univ. Center for Strategy & Tech., Occasional Paper No. 16, Unmanned Aerial Vehicles: Implications for Military Operations (2000) (stressing that the U.S. political climate places great emphasis on minimizing casualties in UAV operations).

162. *See* ELAINE CASSEL, THE WAR ON CIVIL LIBERTIES xv (2004) (stating that President Bush declared a War on Terror in his speech on September 15, 2001); *see also* Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 394 (2008) (discussing President Bush's declaration of war following the attacks of September 11, 2001).

163. *See* Christopher Greenwood, *International Law and the "War on Terrorism,"* 78 INT'L AFF. 301, 305–6 (2002) (arguing that the term "act of war" is not an appropriate classification for the war against terrorism); *see also* O'Connell, *supra* note 162, at 394 (positing that scholars were not convinced that an actual war was on the horizon even though the president announced that the United States was at war).

164. *See* O'Connell, *supra* note 162, at 394–95 (asserting that international humanitarian law applies when countries begin to use their military to fight opposing governments); *see also* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 2 (2004) (claiming that international humanitarian law applies to international and non-international armed conflict).

international armed conflict[165] and non-international armed conflict.[166] International armed conflict requires compliance with all four Geneva Conventions of 1949,[167] while non-international armed conflict requires compliance with article 3 of the four Geneva Conventions.[168]

The challenge of the war on terror is that it does not fit neatly into the international/non-international paradigm.[169] Scholars, practitioners, and politicians disagree over whether to classify it as a war, a criminal matter for law enforcement, something in between, or something entirely different.[170] Although differences remain over the precise contours of non-international armed conflict,[171] a balanced perspective posits that it consists of fighting of a certain

165. *See* Int'l Committee of the Red Cross, *What Is International Humanitarian Law?*, Advisory Service on Int'l Humanitarian L., 1 (2004), http://www.ehl.icrc.org/images/resources/pdf/what_is_ihl.pdf (last visited Mar. 23, 2011) (defining international armed conflict as conflict involving two or more states); *see also* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 378 (2008) (identifying international armed conflict as one of the two categories of armed conflict).

166. *See* Int'l Committee of the Red Cross, *supra* note 165, at 1 (defining non-international armed conflicts as "those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other"); *see also* Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499, 501 (2005) (identifying non-international conflict as the second category of armed conflict).

167. *See* Int'l Committee of the Red Cross, *supra* note 165, at 1 (concluding that countries are subject to the four Geneva Conventions during any international armed conflicts); *see also* Leila N. Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT'L L. & POL'Y 539, 544 (2009) (suggesting that the four Geneva Conventions of 1949 are the "gold standard" with regard to international armed conflict).

168. *See* Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. UNIV. L. REV. 145, 147 (1983) (maintaining that although non-international armed conflicts are distinguishable from international armed conflicts because the former are governed by article 3, there still lies an undeniable international character to any armed conflict); *see also* Int'l Committee of the Red Cross, *supra* note 165, at 1 (stating that article 3 is strictly applicable to non-international armed conflicts since they are restricted to intra-state combat).

169. *See* Geoffrey Corn & Eric Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV, 825–27 (2008) (declaring that it is integral for the United States to articulate and apply the laws of war into the armed conflict framework in order to effectuate its military operations); *see also* Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L R. RED CROSS 69, 92–93 (2009) (commenting that the fight against terrorism cannot easily be classified as an international or non-international armed conflict).

170. *See* Duncan Hollis, *Why States Need an International Law for Information Operations,* 11 LEWIS & CLARK L. REV. 1023, 1027 (describing four distinct approaches to classifying the war on terror as compared to that between a "war" and "crime"); *see also* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 355–56 (2010) (maintaining that there is no basis for qualifying an isolated terrorist attack as that of an armed conflict since it is largely criminal in nature).

171. *See* Gabor Rena, When Is a War Not a War?—The Proper Role of the Law of Armed Conflict in the "Global War on Terror," Address at the Workshop on the Protection of Human Rights While Countering Terrorism, (Mar. 16, 2004), *available at* www.icrc.org (commenting implicitly that while humanitarian law recognizes both international and non-international armed conflicts, the latter is inherently more difficult to identify); *see also* MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 2 (2006) (claiming that the existence of "governmental" involvement is oftentimes difficult to identify in non-international armed conflicts).

degree of intensity between identifiable actors, within specific territorial boundaries, and within a determinate and identifiable period of time.[172] The United States has a very strong case that the war on terror is an armed conflict within these standards—there is high-intensity fighting going on between a state (the United States and an organized armed group [al Qaeda]) that has an identifiable end (when al Qaeda either dismantles or ends its practices of and support for terrorism against the United States). Although one could counter that the United States has expanded the conflict beyond any specific territorial boundaries, thus making the hostilities *not* an "armed conflict,"[173] such a result would invite terrorists to exploit porous geographic boundaries[174] and hide themselves within weak or failed states.[175]

Critics counter that the "Global War on Terror" should not, or cannot, be construed in terms of war. They argue that whether construed as international armed conflict or internal armed conflict, "armed conflict" has always been bound by specific geographic limits.[176] They

172. *See* Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER FORUM OF WORLD AFF. 55, 58–63 (2003) (recognizing that the readily identifiable nature of parties, territories, relation of events to the conflict, and a classifiable "end" to the conflict provide framework for an armed conflict); *see also* John C. Yoo & James C. Ho, *International Law and the War on Terrorism*, 44 VA. J. INT'L L. 207, 213 (2003) (commenting that the violence inflicted on the United States on September 11, 2001, met the "level of intensity" required to constitute armed conflict for the purposes of international law).

173. *See* Yoo & Ho, *supra* note 172, at 214 *(*indicating that some commentators believe that an armed conflict does not exist between the United States and al Qaeda because the latter is not a state, and an armed conflict must necessarily involve two or more states); *see also* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858–60 (2009) (stating that the notion of an "armed conflict" against al Qaeda should be rejected because the war on terror lacks a spatial definition).

174. *See infra* note 185 for a discussion of this very phenomenon occurring along the Afghan-Pakistani border; *see also* COLIN FLINT & STEVEN M. RADIL, EURASIAN GEOGRAPHY AND POLITICS 166 (2009) (maintaining that al Qaeda's expansive global network enables it to expand beyond many geographic boundaries); *see also* W. MICHAEL REISMAN & ANDREA ARMSTRONG, CLAIMS TO PRE-EMPTIVE USES OF FORCE: SOME TRENDS AND PROJECTIONS AND THEIR IMPLICATIONS FOR WORLD ORDER 82–83 (Michael N. Schmitt & Jelena Pejic eds., 2007) (commenting that objections to the existence of an armed conflict against terrorist attacks are unsound since the employment of military force is necessary to counteract the attack of "gray areas" in international borders).

175. *See* FLINT & RADIL, *supra* note 174, at 166 (describing al Qaeda's capacity to use Pakistan, a traditionally weak state, to sustain its strength and the success of its networking regime)*; see also* LIANA S. WYLER, CONG. RESEARCH SERV. RL 34253, WEAK AND FAILING STATES: EVOLVING SECURITY THREATS AND U.S. POLICY 1 (2008) (positing that terrorists use economically and politically vulnerable states as their safe havens to organize and launch their attacks).

176. *See* O'Connell, *supra* note 173, at 858 (maintaining that armed conflicts include a limited or identifiable territorial or spatial dimension in order to effectuate armed exchanges); *see also* Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2472 (2008) (presenting commentators that have argued as to the existence of an international armed conflict between the United States and al Qaeda due to its transnational character).

also argue that counterterrorism is more properly classified as a police action than as armed conflict.[177]

This characterization is wrong. Such definitions fail to adequately address the reality that, in the 21st century, globalization has eroded traditionally strict bounds of national sovereignty.[178] Terrorists operate in countries all over the world;[179] often, terrorists operate in failed states, states that are unable to adequately secure their borders, or states with insufficient resources to combat terrorists.[180] The United States has conducted armed UAV strikes in two situations that warrant further analysis: permission by the host state and instances where terrorists remain in uncontrolled border areas.

State permission further muddies the already unclear waters of *jus ad bellum*. On the one hand, one could argue that state permission obviates the need for analysis of violations of terri-

177. *See* Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Law of War*, 28 YALE J. INT'L L. 325, 326 (2003) (claiming that armed conflicts mandate an insurgent group's possession of a government, organized military force, territorial control and a population base, all of which al Qaeda lacks, thus disqualifying the United States' actions against al Qaeda as a legitimate armed conflict); *see also* O'Connell, *supra* note 173, at 858 (commenting that actions in Afghanistan should not be classified as armed conflicts but, rather, as international criminal activity to counter terrorism); *see also* GABRIELLA ECHEVERRIA, TERRORISM, COUNTER-TERRORISM AND TORTURE: INTERNATIONAL LAW IN THE FIGHT AGAINST TERRORISM 15 (2004) (holding that the implementation of counterterrorism measures should be viewed from the perspective of preserving national security against terrorist threats).

178. *See* James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 IRRC 315–16 (2003) (declaring that the increasing frequency of a terrorist threat and scarcity of resources has resulted in a globalized economic interdependence between states); *see also* John R. Worth, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L. J. 260–61 (2004) (noting that traditional notions of state sovereignty have been eradicated owing to the transnational character of global problems).

179. *See supra* notes 71–76 and accompanying text for a discussion of the global reach of counterterrorist operations. *See, e.g.*, Jessica E. Tannenbaum, *Fighting the War on Terrorism With the Legal System: A Defense of Military Commissions*, 11 ANN. SURV. INT'L & COMP. L. 79, 83 (2005) (describing al Qaeda as a terrorist group that has worldwide cells and funds terrorist acts that are carried out on a global scale). *See generally* Christopher C. Joyner & Alexander I. Parkhouse, *Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime*, 45 STAN. J INT'L L. 203, 206 (2009) (explaining that globalization has contributed to the increased number of terrorist groups worldwide that operate on a transnational level).

180. *See* SUSAN E. RICE, SECURITY AND PEACE INITIATIVE, STRENGTHENING WEAK STATES: A 21ST-CENTURY IMPERATIVE 7 (2006), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2006/08globaleconomics_rice02/rice.pdf (last visited Mar. 23, 2011) (discussing the potential for terrorists to exploit failed states); *see also* Olivera Medenica, *The World Bank, the IMF and the Global Prevention of Terrorism: A Role for Conditionalities*, 29 BROOK. J. INT'L L. 663, 668 (2004) (stating that failed states are susceptible to terrorism because their lack of structure and border control makes them susceptible to terrorist infiltration).

torial sovereignty.[181] Because violation of territorial sovereignty is at the very core of *jus ad bellum*,[182] the consequences of "invitation" by the host state to the intervening state remain unclear.[183] While such an invitation to intervene might apply to civil wars, its extension to counterterrorist activities is uncertain.[184]

Uncontrolled territory is also a peculiar case in a *jus ad bellum* study. While the existence of a failed state or uncontrolled region within a state does not, in and of itself, give the United States the right to engage in counterterrorist operations within that state, ignoring such influencing factors would be naïve. Such naïveté would encourage terrorists to shield their activities within a state or region that cannot take legal or military action against them.[185] Such an interpretation of the laws of war would be incompatible with the inherent right of a state to self-defense.[186] The inability of a state to take adequate actions against a known terrorist within its

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181. *See* Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations,"* 51 N.Y. L. SCH. L. REV. 497, 498 n.2 (2007) (affirming that sovereignty is not at issue when the state agrees on intervention); *see also* Norman Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 336 n.21 (2003) (declining to hypothesize the legality of the Yemeni strike had the United States acted without Yemeni permission and cooperation); *see also id.* at 352–58 (explaining that *jus ad bellum* pertained to al Qaeda because of the Yemini consent to the action).

182. *See* U.N. Charter art. 2, para. 4. (stating that under *jus ad bellum*, states must "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state"); *see also* U.N. Charter art. 51 (establishing *jus ad bellum* as a standard permitting states to use self-defense in response to an armed attack).

183. *See* Robert J. Beck Summer, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 796–97 (1993) (explaining that analyses of the permissibility of Grenada's invasion show dispute over the correct understanding of *jus ad bellum*); *see also* Christopher Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 741 n.1 (2003) (limiting definition of "intervention" to those state activities within another state that are "organized and systematic").

184. *See* Le Mon, *supra* note 183 (limiting analysis to civil wars and, by contrasting such intervention with "casual and sporadic" activities, suggesting that those more limited activities might require a different analysis). *See generally* Oscar Schachter, *International Law: The Right of States to Use Armed Forces*, 82 MICH. L. REV. 1620, 1645 (1984) (explaining that during a civil war, intervention by invitation impedes people from resolving their issues for themselves).

185. *See, e.g.*, David Cloud, *As Raids on Afghan Border Increase, U.S. Military Seeks More Troops*, N.Y. TIMES, Jan. 17, 2007, at 10 (describing how the Taliban launches operations against the United States in Afghanistan from the Pakistani side and crosses over to the Afghan side to avoid U.S. counterattacks). *See generally* Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 75 (2003) (indicating that terrorist attacks from states that cannot control terrorist activity are rarely considered armed attacks).

186. *See* U.N. Charter art. 51 (noting that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"); *see also* Stephanie A. Barbour & Zoe A. Salzman, *The Tangled Web: The Right of Self-Defense Against Non-State Actors in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 53, 98 (2008) (affirming that regardless of whether the attacks are made from weak or strong states, all states have the inherent right of self-defense).

borders, for example, could lead to U.S. involvement in various ways.[187] Reflecting the United States' belief that it may intervene where states cannot or will not bring terrorists to justice, some theorists and policy makers have suggested that a state harboring or refusing to take action against terrorists constructively "waives" claims to territorial sovereignty.[188]

As exemplified in the case of Abu Ali al-Harithi, a state may invite action by the United States.[189] Recall that in the case of al-Harithi, Yemeni officials had tried to arrest al-Harithi on many occasions.[190] Indeed, Yemeni policemen and soldiers had already died trying to capture this al Qaeda operative.[191] Ultimately, after a joint intelligence operation involving U.S. and Yemeni officials, CIA officials ordered a Predator strike that killed al-Harithi and his companions.[192] The killing of al-Harithi sparked an outcry by those who believed that Yemen was not sufficiently linked geographically to the rest of the war on terror as well as those who believed that it constituted assassination or extrajudicial killing.[193] Conversely, however, one could focus

187. *See supra* notes 26–29 and accompanying text for discussion of U.S. action in Yemen, and *supra* II.C.1. for discussion of U.S. actions in Pakistan. *See generally* Mohamed R. Hassanien, *International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective*, 36 DENV. J. INT'L L. & POL'Y 221, 239 (2008) (encouraging weak states that may be susceptible to terrorism to work with the United States to better their societies by trading in freedom). *See generally* Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 334 (2006) (suggesting that the United States needs to assist states whose governments cannot protect themselves from terrorist threats).

188. *See* Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L & FOREIGN AFF. 361, 368 (2005) (describing the development of this "involuntary sovereignty waiver" theory by Dr. Richard Haas of the U.S. State Department); *see also* Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 155–56 (2010) (explaining that states waive their claims to territorial sovereignty rights and seek intervention when they massacre their people, accept terrorism, or encourage weapons of mass destruction).

189. *See supra* notes 31–34 and accompanying text; *see also* Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 676 (2007) (indicating that Yemen and the United States worked together to plan an aircraft attack that killed Abu Ali al-Harithi); *see also* Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 79 (2005) (affirming that the U.S. aircraft missile strike was approved by the Yemeni government before it was launched).

190. *See supra* notes 31–34 and accompanying text; *see also* THE SPECTRUM OF ISLAMIC MOVEMENTS 49–50 (Diaa Rashwan ed., 2007) (recognizing the unsuccessful arrest of Abu Ali al-Harithi during a car bombing); *see also* Maggs, *supra* note 189, at 667–68 (2007) (examining the justification of the attack against Abu Ali al-Harithi).

191. *See supra* notes 31–34 and accompanying text; *see also* MICAH ZENKO, BETWEEN THREATS AND WAR: U.S. DISCRETE MILITARY OPERATIONS IN THE POST–COLD WAR WORLD 84 (2010) (stating that 19 Republican guard soldiers were killed trying to capture Abu Ali al-Harithi); *see also* Anthony Dworkin, *"The Yemen Strike: The War on Terrorism Goes Global," Crimes of War Project*, Nov. 14, 2002, *available at* http://www.crimesofwar.org/print/onnews/yemen-print.html (last visited Mar. 23, 2011) (mentioning that 12 Yemeni soldiers were killed in December 2001 in an attempt to capture an al Qaeda cell which was rumored to hold al-Harithi).

192. *See supra* notes 31–34 and accompanying text; *see also* Khan, *supra* note 189, at 79 (detailing the Predator attack targeting Abu Ali al-Harithi); *see also* William A. Rugh, *Yemen and the United States: Conflicting Priorities*, 34 FLETCHER F. WORLD AFF. 109, 111 (2010) (explaining the effect of Abu Ali al-Harithi's killing on counterterrorism cooperation).

193. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC} Comm'n on Human Rights, Report of the Special Rapporteur, Ms. Asma Jahangir, P16, U.N. Doc.E/CN.4/2003/3 (Jan. 13, 2003) (describing the al-Harithi attack as "a clear case of extrajudicial killing"); *see also* THOMAS B. HUNTER, TARGETED KILLING: SELF-DEFENSE, PREEMPTION, AND THE WAR ON TERRORISM 39 (2009) (identifying the killing of Abu Ali al-Harithi as the most noted example of targeted killing in U.S. history).

on whether or not the United States had a right to target al-Harithi based on his membership in al Qaeda.[194] This argument necessarily places greater emphasis on the United States–al Qaeda "war" as opposed to the sovereignty concerns at stake when the United States conducts operations within another country's borders. The sovereignty concerns at stake in the al-Harithi operation, however, were severely diminished by the sovereign's approval and cooperation in the operation.[195] If one accepts the twin premises that al-Harithi's membership in al Qaeda made him an unlawful combatant,[196] and the fact that Yemen approved U.S. action, the major *jus ad bellum* obstacles to the al-Harithi operation appear to be fulfilled. At the very least, one could look at the failed attempts by Yemeni officials to apprehend this terrorist, and view the United States' participation as a form of "collective self-defense" permitted under the U.N. Charter.[197]

B. New Challenges: Analyzing Unmanned Combat Operations Within Traditional Frameworks

The war on terror has challenged the traditional definition of armed conflict.[198] It is tempting to exaggerate the importance of every new legal dilemma and claim that the dilemma requires an overhaul of existing norms, systems, or processes.[199] Indeed, the aforementioned

194. *See* MAGNUS RANSTORP, MAPPING TERRORISM RESEARCH: STATE OF THE ART, GAPS AND FUTURE DIRECTION 138 (2007) (recognizing the various components of the al Qaeda organization); *see also* Norman Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L L. & FOREIGN AFF. 331, 335 (2003) (providing background on al-Harithi's al Qaeda membership).

195. *See* BRUCE D. BERKOWITZ, THE NEW FACE OF WAR: HOW WAR WILL BE FOUGHT IN THE 21ST CENTURY (2003) (describing the sovereign's cooperation in al-Harithi's attack); *see also* Printer, *supra* note 194, at 335–36 (providing detail on the operation behind al-Harithi's killing).

196. *See* Printer, *supra* note 194, at 335–36 (discussing in depth the justification for classifying al-Harithi as an unlawful combatant). In short, when assessing combatants like al-Harithi within the contours of the Geneva Conventions, Printer notes the absurd results that would ensue if combatants who *violate* the laws of war could not be legitimate military targets. *Id.* at 375; *see also* W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 723 (2007) (providing categories that define combatant status). Of course, noncombatant status is typically part of the *jus in bello* analysis. I have included it here in the *jus ad bellum* because the lack of proximity to a regular battlefield raises the implications of a possible breach of sovereignty. In this case, I believe such a status determination is a prerequsite to any *jus ad bellum* determination.

197. *See* LINDA A. MALONE, INTERNATIONAL LAW 130 (2008) (citing U.N. Charter art. 51: "Nothing in the present Charter shall impair the inherent right of individual or *collective self-defence* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (emphasis added); *see also* TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE U.N. CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 85 (2010) (discussing the conditions of a state's sovereign right to collective self-defense).

198. *See, e.g.*, Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 394 (2008) (discussing the confusion over and implications of classifying U.S. counterterrorism efforts as a war); *see also* Duncan Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023, 1026–27 (2007) (describing the "four models" of classifying the war on terror).

199. *See generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996) (noting that a tendency to suggest new rules for innovations often misses the point that a better solution may be a stronger foundation of laws that can then be applied to new technologies); *see also* Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 17 (2011) (remarking that Germany's slapdash attempt to reform its financial laws resulted in a plethora of new legal problems).

mistake in ordering a UAV attack on villagers based on UAV surveillance[200] is certainly not the only case where civilians have died as a result of a remote attack based on high-altitude surveillance. In September 2009, an American plane used its surveillance to detect two fuel tankers thought to be captured by Taliban fighters.[201] This pilot surveillance was corroborated by a single Afghan source and led to the ordering of a bomb attack on the fuel trucks, an attack in which scores of civilians died.[202] Given that the effects of manned and unmanned attacks may be the same, one might think UAVs warrant no special place in the study of the laws of war.

There are two major distinctions between UAVs and manned forms of weaponry, however, that warrant a specialized analysis of UAVs' place in IHL. First, UAVs offer an attractive alternative to manned combat because they are perceived as not putting soldiers in harm's way;[203] second, the increasing complexity of weapons systems strongly suggests that contractors will be operating unmanned weaponry for the foreseeable future.[204] These concepts, though interrelated, warrant further discussion as separate phenomena before their combined impact may fully be recognized.

C. UAVs and *Jus in Bello*

It would be difficult to overstate the rapidly escalating role of UAVs in U.S. military operations and strategic decision making.[205] While several studies have recognized the dangerous

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200. *See supra* notes 1–5 and accompanying text for discussion of the "Tall Man Khan" incident; *see also* DAN SCHONFELD ET AL., VIDEO SEARCH AND MIMING 286 (2010) (demonstrating the process behind utilizing UAV surveillance); *see also* U.S. Cong. Office of Tech. Assessment, New Technology for NATO: Implementing Follow-On Forces Attack 164 (U.S. Government Printing Service, 1987) (listing new developments in UAV surveillance to carry out various operations for NATO).

201. *See* Rajiv Chandrasekaran, *Sole Informant Guided Decision on Afghan Strike*, WASH. POST, Sept. 6, 2009, at A1 (describing U.S. surveillance on what was mistaken for Taliban fighters); *see also* Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 80 (2010) (stating American planes attacked fuel tankers thought to be Taliban vehicles).

202. *See* Chandrasekaran, *supra* note 201, at A1 (recounting a U.S. attack on civilian vehicles in Afghanistan); *see also* Blank & Guiora, *supra* note 201 (listing the civilian casualties of a U.S. strike).

203. *See* Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 38–40 (discussing the attractiveness of unmanned combat as contrasted with ground fighting); *see also* David Goodman, *The Kremlin Goes Drone Shopping*, N.Y. TIMES, Nov. 18, 2008, at A1 (positing that UAVs keep soldiers out of harm's way).

204. *See supra* II.C.2. for a discussion of contractors operating UAVs; *see also* Michael Franklin, *Unmanned Combat Air Vehicles: Opportunities for the Guided Weapons Industry?*, ROYAL UNITED SERVICES INSTITUTE FOR DEFENSE AND SECURITY STUDIES, Sept. 2008, at 27 (examining the increasing complexities of UAVs and their increasing prominence in the world today); *see also* Dr. Robbin Laird & Dr. Scott Truver, *Forging a 21st Century USN and USMC: C4ISR D as a Key Element for XXIst Century Power Projection Force*, SLD—SECOND LINE OF DEFENSE, Nov. 2010, at A1 (showing the Navy's wide use of UAVs and their complex network needs).

205. *See generally* P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (2009) (arguing that the "robotics revolution" of the 21st century drastically changed the way war is conducted); *see also* Rahul Sah, *Robotics Changing War Into a Video Game*, CIOL (2009) at A1 (claiming UAVs are becoming more and more crucial in military actions); *see also* Preston Lerner, *Robots Go to War*, POPULAR SCI., Dec. 20, 2005, at 2 (estimating one-third of combat being unmanned in the next few years).

allure of using UAVs to keep soldiers out of harm's way,[206] often overlooked is the possibility that UAVs give the United States a strategic military option in varied cases where ground troops are not a possibility.[207] Everyone from vice presidents[208] to political pundits[209] recognizes the facial appeal of increasingly using UAVs and shifting the risk away from soldiers in already existent theaters of war.[210] People fail to recognize, however, the potential for powerful impact on U.S. policy of UAV use *outside* Afghanistan or Iraq.[211]

Yemen is one of those places where the United States proved the potential for UAVs to expand the geographic bounds of war. Accordingly, the controversy that emerged over the al-

206. *See, e.g.*, Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 38 (detailing the call by some politicians and journalists to withdraw troops from Afghanistan and increase UAV strikes); *see also* SINGER, *supra* note 205, at 319–20 (discussing how UAVs lower the human cost of war and thus make the decision to go to war more politically viable); *see also* Anne Broache, *Drone Aircraft Will Be Smarter, More Social*, CNET NEWS, May 9, 2007, at 1, *available at* http://news.cnet.com/Drone-aircraft-will-be-smarter,-more-social/2100-1008_3-6182320.html (last visited Mar. 23, 2011) (noting the tactical advantages of UAV warfare combined with the safety it affords to soldiers).

207. Several studies tangentially touch upon this idea but fail to fully develop it as an important part of the analysis of UAV attacks. Peter Bergen and Katherine Tiedemann, for example, discuss a September 2007 Navy SEAL operation where the team crossed the Afghani-Pakistan border into South Waziristan, Pakistan. *See* Peter Bergen & Katherine Tiedemann, *The Drone Wars: Are Predators Our Best Weapon or Worst Enemy?*, THE NEW REPUBLIC, June 3, 2009 at A1. During the operation, 20 Pakistanis, including women and children, were killed. *See id.*, at A1. Pakistani officials harshly decried the operation as a clear violation of their state's sovereignty. *See id.*, at A1. "In the face of the intense Pakistani opposition to American boots on the ground," Bergen and Tiedemann note, "the Bush administration chose to rely on drones to target suspected militants." *See id.* at A1. This comes close to but does not fully complete the argument that UAVs have affected U.S. foreign policy by creating a military option where one may not have existed before the UAV. In a similar vein, P.W. Singer notes that "[u]nmanned systems may lessen the terrible costs of war, but in so doing, they will make it easier for leaders to go to war." *See* SINGER, *supra* note 205, at 319.

208. *See* Peter Baker, *Biden No Longer a Lone Voice on Afghanistan*, N.Y. TIMES, Oct. 13, 2009, at A1 (saying Vice President Biden supports the use of drones in warfare in Afghanistan). *See generally* Posting of Jesse Lee to the White House Blog, *Vice President Biden in Afghanistan: "It's Afghans Who Must Build Their Nation"* (Jan. 11, 2011, 15:03 EST) *available at* http://www.whitehouse.gov/blog/2011/01/11/vice-president-biden-afghanistan-it-s-afghans-who-must-build-their-nation (last visited Mar. 23, 2011) (describing Vice President Biden's views on the war in Afghanistan).

209. *See* Richard Cohen, *Why "Surge Light" Won't Work*, WASH. POST, Nov. 10, 2009 (arguing that the United States should "leave Afghanistan to the drones and the Special Forces"); *see also* Christopher Drew, *Drones Are Playing a Growing Role in Afghanistan*, N.Y. TIMES, Feb. 19, 2010, at A1 (implying that the use of drones in military action is beneficial and should be expanded).

210. *See* Jonathan Manes, *Request Under Freedom of Information Act/Expedited Processing Request*, AMERICAN CIVIL LIBERTIES UNION, Jan. 13, 2009, at 3 (insisting that suggested solutions to problems in Afghanistan, a recognized theater of war, appear to be based on U.S. conduct in Pakistan, where there are currently no U.S. combat troops).

211. *See* Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 42–45. This is not to say that incidents of UAV use outside the formal theaters of combat go unreported or unanalyzed. Jane Mayer's analysis of the drone war in Pakistan provides insightful analysis into the origins of the Predator attacks, the myriad supervision and control issues, and how the attacks affect Pakistani views toward the United States. *See, e.g.*, Manes, *supra* note 210, at 3 (stating drones have been used in Pakistan and Yemen, where no formal war existed).

Harithi strike is unsurprising: Norman Printer justified the strike,[212] while others denounced it as an extrajudicial killing.[213] *Jus in bello*, or the law that applies during combat operations, requires military necessity, discrimination between combatants and noncombatants, and proportionality.[214]

Military necessity requires that the operation be necessary toward achieving a legitimate military objective.[215] In cases of high-value military targets, like killing a high-ranking member of your enemy,[216] the effectiveness of the attack is readily apparent. The United States can make a claim to at least one legitimate military objective: disruption of the al Qaeda network and the prevention or disruption of any planned attacks by al-Harithi.

As far as discrimination is concerned, one can argue that the Predator strike was highly discriminate. The drone attacked al-Harithi and his companions when their vehicle was the only one on a road.[217] Further, the attack did not appear to injure civilians; the five passengers were believed to be lower-level members of al Qaeda working for al-Harithi.[218] With zero civil-

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212. *See supra* notes 98–101 and accompanying text; *see also* Norman Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L L. & FOREIGN AFF. 334, 382 (2003) (opining that the U.S. attack on six suspected terrorists in Yemen was lawful because al Qaeda continued to pose a security threat to the United States); *see also* Jordan J. Paust, *Self Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 239 n.3 (2010) (citing Norman Printer, Jr., as one of the many writers that support the view that an attack on a state by a non-state actor can trigger the right to self-defense against it in a foreign country).

213. *See supra* note 97 and accompanying text; *see also* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 362 (2010) (noting that the Special Rapporteur denounced the CIA drone strike in Yemen as unauthorized extrajudicial killing); see *also* Uri Fisher, *Deterrence, Terrorism, and American Values*, HOMELAND SECURITY AFFAIRS, Vol. III No. 1, Feb. 2007, *available at* http://www.hsaj.org/?fullarticle=3.1.4 (last visited Mar. 23, 2011) (stating that the attack on al-Harithi was described in a U.N. Report as a clear case of extrajudicial killing).

214. *See supra* II.B.1.; *see also* RETHINKING THE JUST WAR TRADITION 25–26 (Michael W. Brough et al. eds., 2007) (stating that a war is fought justly when the *jus in bello* criteria of discrimination and proportionality are satisfied); *see also* JEFFREY CARR & LEWIS SHEPHERD, INSIDE CYBER WARFARE: MAPPING THE CYBER UNDERWORLD 71–72 (2009) (discussing the four basic principles of *jus in bello* that regulate the conduct of states during war, namely: distinction, necessity, humanity, and proportionality).

215. *See supra* notes 41–50 and accompanying text for an overview of the doctrine of military necessity; *see also* The Lieber Code of 1863, Gen. Orders No. 100, § 14 (1863), *available at* http://www.civilwarhome.com/lieber-code.htm (last visited Mar. 23, 2011) (defining military necessity as those measures that are indispensible for securing the ends of war); *see also* Craig J. Forest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT'L L.J. 177, 184–85 (2007) (outlining the scope of the doctrine of Military Necessity and the limitations on the means and methods of achieving military objectives).

216. *See* Seymour M. Hersh, *Manhunt: The Bush Administration's New Strategy in the War Against Terrorism*, THE NEW YORKER, Dec. 23, 2002, at 66 (noting that al-Harithi was classified as a "high-value" target because of his role in the bombing of the *U.S.S. Cole* in 2002); *see also* Walter Pincus, *U.S. Missiles Kill al-Qaeda Suspects*, THE AGE, Nov. 6, 2002, *available at* http://www.theage.com.au/articles/2002/11/05/1036308311314.html (last visited Mar. 23, 2011) (describing al-Harithi as one of the terrorist network's top figures in Yemen).

217. *See* Pincus, *supra* note 216 (explaining that the Predator used satellite signals to track al-Harithi's vehicle as it sped along a highway); *see also* James Risen, *Threats and Responses: Drone Attack; An American Was Killed by U.S., Yemenis Say*, N.Y. TIMES, Nov. 8, 2002, at 13 (stating that al-Harithi's car was traveling in a remote desert region at the time it was struck by the missile).

218. *See* Hersh, *supra* note 216 (explaining that Yemeni and American officials told reporters that the five passengers had terrorist ties); *see also* Pincus, *supra* note 216 (noting that all six passengers killed in the Yemen attack were suspected terrorists).

ian casualties, one would be hard-pressed to claim that the attack failed to distinguish between military and civilian targets. Assuming arguendo, however, that one or more of al-Harithi's companions were civilians, the attack could still likely pass a discrimination test. IHL does not have a zero-tolerance policy with respect to civilian casualties.[219] Rather, the important thing to remember regarding discrimination is that "civilians may never be intentionally targeted."[220] Here, the target was al-Harithi, a member of al Qaeda. The only way in which he might be considered a "civilian" target would be to deny the ability of the United States to target members of al Qaeda in the first place.[221] If one accepts the premise that the United States may target al Qaeda personnel, however, then the United States followed the principle of discrimination in its attack on al-Harithi.

Finally, proportionality requires that one assess whether the attack involved excessive civilian harm in relation to the military objective.[222] If al-Harithi's companions were al Qaeda members, then the attack would certainly be proportionate. If, on the other hand, we again assume arguendo that one or more companions were not al Qaeda members, then the question becomes whether they were incidental civilian deaths or unnecessarily excessive casualties.[223] Military commanders and legal scholars alike will refuse to offer a concrete number of acceptable civilian casualties in relation to a given military advantage.[224] Rather, this will be a judg-

219. *See* Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 427 (2009) (asserting that IHL anticipates that civilians may be injured in the course of attacks on legitimate military targets); *see also* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. POL'Y 101, 125–26 (2009) (providing examples of U.S. drone strikes where military officials determined that risks to civilian casualties were justifiable). The issue of permissible civilian casualties, which goes to proportionality, will be dealt with in the next paragraph.

220. *See* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 392 (3d ed., 2008) (discussing that the principle of discrimination requires that military attacks be carried out strictly against military objectives and never against civilians); *see also* Beard, *supra* note 219, at 427 (explaining that the initial rule regarding military objectives is that civilians must never be intentionally targeted).

221. The conclusion that the United States cannot target members of al Qaeda could stem from the initial premise that the United States is not engaged in an "armed conflict." *See* Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Law of War*, 28 YALE J. INT'L L. 325, 326 (2003) (arguing that the United States cannot be at "war" with "al Qaeda" because the lowest level of armed conflict applies to insurgencies, and al Qaeda has not gained insurgent status); *see e.g.*, Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1012–15 (2d Cir. 1974) (holding that the United States could not be at war with the Popular Front for Liberation of Palestine because it was a radical political group, not a sovereign government, and therefore a non-insurgent actor).

222. This is the formula adopted by Protocol I of the Geneva Conventions. *See* THE LEGITIMATE USE OF MILITARY FORCE: THE JUST WAR TRADITION AND THE CUSTOMARY LAW OF ARMED CONFLICTS 189 (Howard M. Hensel ed., 2008) (explaining that the principle of proportionality requires that combatants engaging in military attacks must be certain that collateral harm to civilians is not disproportionate to the advantage gained).

223. *See* Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts, art. 57(2)(a)(iii), Jun. 8, 1977, 16 I.L.M. 1391 (ordering that precautions must be taken against launching any attack that would cause excessive incidental loss to life in relation to the damage anticipated); *see also* Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L. L. 391, 407 (1993) (observing the significant room for interpretation on whether a specific attack is excessive).

224. *See* DAVID KENNEDY, OF WAR AND LAW 143–47 (2006) (emphasizing the lack of a quantifiable metric and the point that the question of acceptable number of civilian casualties will be a judgment call); J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces* 57 A.F. L. REV. 155, 183 (2005) (noting that the issue of when civilian losses should be considered excessive is subjective and unresolved).

ment call.[225] Given the high-value nature of al-Harithi, the small scale of the attack, and the suspected nature of his companions, I believe the case for this attack's proportionality is very strong.

Because less is known about Predator drone attacks in Pakistan, it is harder to conduct a complete analysis of them. A recent study by the New American Foundation[226] provides, perhaps, the most complete compilation of information on Predator strikes.[227] The report suggests that since 2004, approximately 1,411 to 2,247 people have been killed by UAV attacks.[228] Of those people, the study says, approximately 277 to 435 were civilians (20% of total persons killed).[229] Meanwhile, the rest were militants, including approximately 32 militant leaders from al Qaeda, the Taliban, and their allies.[230] There are, of course, competing studies that put the civilian-combatant casualty ratio at such disparate levels as 9:1 and 1:9. All these studies necessarily carry biases. The *Long War Journal* study, for example, is colored by its presumption that unknowns are combatants, and that only those killed who were *specifically* identified as civilians were non-militants.[231] At the very opposite end of the spectrum, there are reports of more than 600 civilian deaths that derive their figures solely by subtracting the number of al-Qaeda leaders killed from the total number of deaths in UAV strikes.[232] The obvious problem with that calculus is that it does not count non-leadership militants at all. Because the New

225. *See* KENNEDY, *supra* note 224, at 143–47; *see also* Gardam, *supra* note 223, at 407 (emphasizing that the Protocol I Test of what types of attacks could cause excessive civilian casualties is necessarily subjective).

226. See *The Year of the Drone*, NEW AMERICAN FOUNDATION, Feb. 25, 2011, *available at* http://counterterrorism.newamerica.net/drones (last visited Mar. 23, 2011) (putting forth their analysis of the number of individuals killed by drone attacks since 2006, continually updated to reflect the current estimates of drone-related deaths); *see also id.*, at appendix 1 (summarizing, in a table, the estimated total deaths from U.S. drone strikes in Pakistan, as well as estimated militant deaths and militant leaders killed by such attacks); *cf.* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 344 n.10 (2010) (disagreeing with New America Foundation's use of the terms "civilian" and "combatant").

227. *See* Peter Bergen & Katherine Tiedemann, *The Drone Wars: Are Predators Our Best Weapon or Worst Enemy?*, NEW REPUBLIC, June 3, 2009 at A1 (utilizing their own report to deduce trends in UAV attacks); *see also NSJ Analysis: Turning Off Autopilot: Towards a Sustainable Drone Policy*, HARV. NAT'L. SEC. J., Mar. 6, 2010, *available at* http://www.harvardnsj.com/2010/03/nsj-analysis-turning-off-autopilot-towards-a-sustainable-drone-policy/ (last visited Mar. 23, 2011) (comparing the Bergen and Tiedemann reports to other sources).

228. *See The Year of the Drone*, *supra* note 226 (positing that these numbers of people were killed in drone attacks by the U.S. military since 2004); s*ee also* Bill Roggio & Alexander Mayer, *Analysis: A Look at US Airstrikes in Pakistan Through September 2009*, LONG WAR JOURNAL, Oct. 1, 2009, http://www.longwarjournal.org/archives/2009/10/analysis_us_airstrik.php (last visited Mar. 23, 2011) (reporting similar numbers of total casualties over comparable periods).

229. *See The Year of the Drone*, *supra* note 226; *cf. NSJ Analysis*, *supra* note 227 (reporting that civilian deaths have been alleged to be as high as 98% or as low as 10% of total deaths).

230. *See* Laurie R. Blank & Benjamin R. Farley, *Characterizing U.S. Operations in Pakistan: Is the United States Engaged in an Armed Conflict?* 34 FORDHAM INT'L L.J. 151, 158 (2011) (indicating that drone strikes in Pakistan have primarily targeted the Tehrik-e-Taliban Pakistan stronghold but also have targeted al Qaeda and the Haqqani Network); s*ee also The Year of the Drone*, *supra* note 226.

231. *See* Blank and Farley, *supra* note 230, at 158 (explaining the difficulty of determining the proportion of civilian-to-combatant casualties when relying on news reporting); *cf.* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of the U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 274-75 (criticizing a methodology that would count all casualties, except a drone's intended target, as persons not involved in hostilities).

232. *See* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 126 (2010) (citing disagreement on the point of civilian casualties).

American Foundation study does not suffer from these initial biases, it is likely the most accurate account of the civilian-combatant casualty ratio.

Where does this leave us in terms of the legality of the Predator attacks in Pakistan? Again, the principles of military necessity, discrimination, and proportionality inform the analysis.[233] Military necessity is difficult to assess because, for actions that are not even formally acknowledged by the U.S. government,[234] the military objective may not be clear. At times, the objective has been to target a specific enemy combatant.[235] Chief among these specifically targeted enemies was Baitullah Mehsud, head of the Pakistani Taliban.[236] Mehsud was the intended target of 15 drone attacks in 2009.[237] The 15th attempt, on August 5, was successful.[238] Like the

233. These principles are defined and explained in II.B.1. These three are *jus in bello* principles that go to the legality of the specific conduct. The *jus ad bellum* analysis for drone attacks in Pakistan is also complex, but the lack of formal statements by U.S. and Pakistani officials on cooperation make the analysis even more difficult. Most analysts believe that Pakistan informally approves of and even supplies intelligence information for the U.S. attacks. *See, e.g.*, Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009. The sentiment is that the Pakistani government publicly opposes all U.S. drone attacks while privately furnishing intelligence to the United States behind the scenes. *See* Isambard Wilkinson, *Pakistan "Helps U.S. Drone Attacks,"* DAILY TELEGRAPH, Apr. 3, 2009. This cooperation between the two governments likely undermines the Pakistani claim of infringement on its sovereignty. Especially in the case of Pakistan and the United States working together to kill a single Taliban leader, the concept of *jus ad bellum* with respect to Pakistan does not appear to apply. Rather, the proper analysis would be the *jus ad bellum* justification for a U.S. attack on the Taliban. Such an analysis would likely follow that employed by Norman Printer in his *jus ad bellum* analysis for U.S. attacks on al Qaeda. In his analysis, Printer concluded that U.S. attacks on al Qaeda are justifiable as self-defense in response to al Qaeda's attack against the United States on September 11, 2001. *See* Norman Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L L. & FOR. AFF. 331, 337–38, 381–82 (2003).

234. *See supra* note 115 for examples of the United States declining to comment on UAV attacks in Pakistan; *see also* Christina Lamb, *Stop Bombing Us: Osama Isn't Here, Says Pakistan*, THE SUNDAY TIMES, Jul. 12, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/asia/article6689741.ece (last visited Mar. 23, 2011) (alleging that the United States has not acknowledged over 40 attacks that have been carried out in Pakistan from 2008 to 2009 and have resulted in hundreds of deaths); *see also* Riaz Khan, *4 Killed in an Attack on NATO Convoy in Pakistan*, YAHOO! NEWS, Feb. 25, 2011, *available at* http://news.yahoo.com/s/ap/20110225/ap_on_re_as/as_pakistan (last visited Mar. 23, 2011) (indicating that the United States does not publicly acknowledge either the February 2011 Pakistani drone attacks or any other attacks since 2008 nor whom they targeted).

235. *See infra* notes 236–39 and accompanying text for a discussion of targeting of specific enemy combatants; *see also* Mayer, *supra* note 233 (reporting that during 2009, 18 out of 41 drone attacks have been directed at specific Taliban groups in Pakistan); *see also* Matthew Rosenberg, Zahid Hussain & Siobhan Gorman, *U.S. Drone Kills Chief of Taliban in Pakistan*, WALL ST. J., Aug. 8, 2009, *available at* http://www.online.wsj.com/article/SB124961991813313685.html (last visited Mar. 23, 2011) (explaining that the 2009 drone attacks attempted, in part, to target Taliban leaders along the Pakistan-Afghanistan border).

236. *See* Wilkinson, *supra* note 233 (identifying Mehsud as a major terrorist threat to America); *see also* Pir Zubair Shah, Sabrina Tavernise & Mark Mazzetti, *Taliban Leader in Pakistan Is Reportedly Killed*, N.Y. TIMES, Aug. 7, 2009, at A1 (referring to Taliban leader Mehsud as "Pakistan's enemy No. 1").

237. *See* Peter Bergen & Katherine Tiedemann, *Revenge of the Drones*, NEW AMERICAN FOUNDATION, Oct. 19, 2009, app. 1, *available at* http://www.newamerica.net/publications/policy/revenge_of_the_drones (last visited Mar. 23, 2011) (asserting that exactly 15 drones were aimed specifically at Mehsud). *See generally* Roggio & Mayer, *supra* note 228 (declaring that Mehsud's territory was struck 20 times within a year before he was finally killed).

238. *See* Bergen & Tiedemann, *supra* note 237 (stating that 14 missile strikes were aimed at Mehsud before he was killed by the 15th one); *see also* Rosenberg, Hussain & Gorman, *supra* note 235 (reporting that Baitullah Mehsud, the chief of Pakistan's Taliban, was killed by a U.S. missile on Wednesday, August 5, 2009).

attack on al-Harithi, one can likely find military necessity in an attack on a vital part of the enemy's command.

More uncertain is the military necessity of attacks on lower-level members of al Qaeda and the Taliban.[239] One report suggests a risk that the Predator strikes may have evolved from a few attacks on specific, high-level targets to greater numbers of attacks on low-level militants.[240] At the same time, however, this report notes that Predator attacks have forced surviving militants to act more cautiously and indicates that "there is evidence that the drone strikes, which depend on local informants for targeting information, have caused debilitating suspicion and discord within the ranks."[241] If one perceived the military objective to be severe disruption of enemy activities and the destruction of enemy cohesion, these attacks could well satisfy the flexible standards of military necessity.[242]

Discrimination, meanwhile, is likely satisfied (in the general sense) due to the fact that Predator drones' Hellfire missiles are precision weapons.[243] While a thorough discussion of what constitutes a "discriminate" weapon is beyond the scope of this comment, one principle worthy of note is that the size of the weapon does not, in and of itself, determine whether a weapon is discriminate.[244] Indeed, in 1996, the International Court of Justice (ICJ) ruled that

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239. *See* Mayer, *supra* note 233 (noting the large number of attacks on low-level Pakistani Taliban members and the controversy surrounding whether they were legitimate targets for a Predator strike); *see also* Christina Lamb, *Stop Bombing Us: Osama Isn't Here, Says Pakistan*, THE SUNDAY TIMES, Jul. 12, 2009 (commenting that the United States focused its bomb attack on mid-level militants and "not big fish").

240. *See* Mayer, *supra* note 233 (explaining that author of *Revenge of the Drones*, Peter Bergen, suggested that the U.S. forces may have "[gone] beyond the authorization to kill leaders" when they killed low-level militants). *See generally* Siobhan Gorman & Peter Spiegel, *Drone Attacks Target Militant Pakistan*, WALL ST. J., Sept. 17, 2009 (stressing that attacks on lower-level militants are important and justified because they eliminate them as potential replacements for high-level commander positions).

241. *See* Ahmed Humayun, *Pakistan's Suspicious Public*, FOR. POL'Y, Jul. 9, 2010, *available at* http://www.foreignpolicy.com/articles/2010/07/09/pakistans_suspicious_public?page=full (last visited Mar. 23, 2011) (claiming that despite Pakistanis' anti-Taliban position, there has been an increased anti-American sentiment as a result of increased drone attacks).

242. In her article opposing UAV attacks in Pakistan, Mary Ellen O'Connell argues that there is not likely a military necessity. *See* Mary Ellen O'Connell, Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004–2009, 24 (N.D. L. Sch. Legal Studies Research Paper No. 09-43, 2009), *available at* http://ssrn.com/abstract=1501144 (last visited Mar. 23, 2011). O'Connell claims that military necessity is offset by the adverse consequences of the UAV attacks. *See id.* However, this appears to conflate military necessity with O'Connell's personal analysis of the UAV attacks' effectiveness. In reality, military necessity must align with legitimate military objectives. *See* Lieut. Col. Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combat Detainees, Unlawful Belligerency, and the International Law of Armed Conflict*, 55 A. F. L. REV. 1, 7 (2004).

243. *See, e.g.*, *AGM-114 Hellfire Modular Missile System*, GLOBALSECURITY.ORG, *available at* http://www.globalsecurity.org/military/systems/munitions/agm-114-var.htm (last visited Mar. 23, 2011) (describing the Hellfire missile's precision guidance system); *see also* Bialke, *supra* note 242, at 7 (asserting that "discrimination" is generally about identifying and discriminating between militants and civilians when combat targeting in order to avoid killing civilians).

244. *See* WAR: ESSAYS IN POLITICAL PHILOSOPHY 171 (Larry May & Emily Crookston eds., 2008) (stating that the determination of whether a weapon is discriminate depends primarily on the use of the weapon and not on the type of weapon it is). *See generally* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 1, 77 (discussing various reasons why certain types of weapons are prohibited under international law).

nuclear weapons themselves were not per se indiscriminate.[245] Thus, the appropriate question for any given attack would be whether the Hellfire missile is *capable* of distinguishing military from civilian targets. While we do not have the evidence to prove this one way or another, the ratio of military-to-civilian deaths in the drone attacks suggests that the weapons have been used discriminately.

Finally, proportionality requires that the attack be limited in nature with respect to the military objective.[246] Proportionality is difficult to define,[247] and like military necessity, one's analysis of proportionality will likely reflect how valid one perceives the military objective. If one rejects the notion that killing low-level al Qaeda and Taliban militants is a strong military objective, one would be more likely to find the U.S. Predator strikes disproportionate. If, however, one views the U.S. actions as very important to its war on terror, the Predator strikes are more likely to be found proportionate. Overall, however, one would be hard-pressed to deny that the United States has used drones against a declared enemy and has done so in a way to minimize collateral damage. Given these circumstances, I would argue that the Predator strikes in Pakistan are proportionate.

As the debate about continued U.S. involvement in Afghanistan rages, one current proposal is to increase use of UAVs while pulling back combat troops from the theater. This proposal rests on the allure of UAVs—that they can be effective and prevent the deaths of American troops.[248] As P.W. Singer notes, however, "Unmanned systems may lessen the terrible costs of war, but in doing so, they will make it easier for leaders to go to war."[249]

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245. *See* Legality of the Threat or Use of Nuclear Weapons, *supra* note 244, at 97–98 (declaring that the court cannot make the determination on whether the threat or use of nuclear weapons is per se legal or illegal under all circumstances); *see also* HELEN DUFFY, THE "*WAR ON TERROR*" AND THE FRAMEWORK OF INTERNATIONAL LAW 239 (2005) (noting that nuclear weapons have not been deemed per se unlawful by the ICJ).

246. *See supra* notes 58–65 and accompanying text; *see also* JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 106 (2004) (mentioning that the concept of proportionality involves an analysis of whether military significance justifies a certain outcome); *see also* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 22 (2009) (explaining that an attack is unlawful if the effects of the attack are unrelated to the military objective).

247. *See supra* notes 58–65 and accompanying text; *see also* THE VIABILITY OF HUMAN SECURITY 31 (Monica den Boer & Jaap de Wilde eds., 2008) (commenting that some leeway should be given to the legal definitions of proportionality and necessity because of their lack of clarity); *see also* Major Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 1, 31 (1994) (indicating that the concept of proportionality is not easy to define).

248. *See* INTELLIGENT COMPUTING 574 (De-Shuang Huang, Kang Li & George William Irwin eds., 2006) (treating the UAV as an effective solution to avoiding dangerous and expensive operations); *see also* Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 40–41 (explaining that the effectiveness of the Predator drone program has forced terrorists in Pakistan to focus their attention on their own safety and away from plans for future attacks).

249. *See* P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY 319 (2009) (identifying the benefits and repercussions of unmanned systems). *See supra* note 157 and accompanying text for Singer's elaboration of the effects of UAVs on the decision to go to war; *see also* ANTHONY H. CORDESMAN, THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS 315 (2003) (declaring the UAV as a cost-effective solution to providing support to other combat units).

The missing piece of the puzzle is that in addition to starting new wars, UAVs may allow the United States to fundamentally change ongoing wars. As mentioned, President Bush declared a Global War on Terror, promising to strike the terrorists who attacked America wherever they were found.[250] When the United States conducts military operations against al Qaeda and Taliban forces in Yemen and Pakistan, one may perceive these operations as part of the War on Terror.[251] Yet the lingering question is whether this is a measure of last resort—if, in fact, the United States has "exhausted all other alternatives."[252] The current use of UAVs meets this requirement. The militants killed in these strikes intentionally hide in the rugged, uncontrolled terrain of Pakistan that abuts Afghanistan. There is ample evidence of those terrorists crossing the border, attacking U.S. soldiers, and returning across the border to seek safe haven. Furthermore, Pakistan has shown that it is unable to capture al Qaeda and Taliban militants within its borders.[253] While Singer's warnings about the lure of robotic warfare should be heeded, the use in Pakistan likely meets the standards of IHL. Once a set of U.S. operations begins to stray from the core fight against al Qaeda and other terrorists, it would likely fail to satisfy one or

250. *See supra* note 66 and accompanying text; *see also Authorization of the Use of United States Armed Forces Against Iraq*, 107th Cong. 19148 (2002) (identifying the broad scope of the war on terror); *see* THE GEORGE W. BUSH FOREIGN POLICY READER: PRESIDENTIAL SPEECHES WITH COMMENTARY 38 (John W. Dietrich ed., 2005) (recalling President Bush's declaration of the War on Terror on all terrorists, not just those who have performed terrorist acts).

251. *See* LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD 79 (Chester A. Crocker, Fen Osler Hampson, & Pamela Aall eds., 2007) (discussing the operations against al Qaeda in Yemen and Pakistan within the constructs of the War on Terror); *see also* Norman Printer, *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOR. AFF. 331, 332–335 (2003) (analyzing the strike against al-Harithi in this fashion).

252. *See supra* notes 90–94 for a discussion of how this phrase, famously employed by Daniel Webster, plays a role in assessing combat operations; *see also* Allen S. Weiner, *Symposium: Symposium, Crimes, War Crimes, and the War on Terror*, 11 LEWIS & CLARK L. REV. 997, 1006 (2007) (emphasizing that the United States has exhausted all "her military alternatives" in confronting al Qaeda); *see also* Andrew J. Calica, Note, *Self-Help Is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 CORNELL INT'L. L. J. 389, 420–21 (2004) (indicating that self-help in Yemen and other areas was necessary because terrorists were harbored there, and all other reasonable alternatives were exhausted).

253. The agreement between the United States and Pakistan on air strikes against Mehsud, described in *supra* notes 236–39 and accompanying text, shows that Pakistan does not have the resources (or will) to fully address terrorism within its own borders. *See* STERLING MICHAEL PAVELEC, THE MILITARY-INDUSTRIAL COMPLEX AND AMERICAN SOCIETY 139 (2009) (noting Pakistan's inability to capture al Qaeda or Taliban militants within its borders partly because of its inadequate rules of engagement).

more aspects of IHL—for example, military necessity. At present, however, the operations have been selective and in such a manner that complies with the laws of war.

D. Contractors at the Helm?

Contractors, in some shape or form, have assisted military operations for centuries.[254] They have become more relied upon in weapons operation, however, as weapons systems have become increasingly complex.[255] The lines between creating, designing, assembling, or operating weapons increasingly blur when the weapon in question is unmanned.[256] Given the already discussed uncertainty over the legality of UAV attacks *generally*, the matter becomes further complicated when one does not know who is liable for potentially illegal attacks by UAVs.[257] One possible solution would be to promote responsible and restrictive use of UAVs by holding the commander responsible under a theory of command responsibility.[258] Another solution is to inform designers or operators that they are responsible for the conduct of a UAV.[259] Yet another possibility is to design a system whereby contractors are considered quasi reservists,

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254. Even though the British famously employed Hessian mercenaries during the American Revolutionary War, the American army employed civilians in support roles. *See* Harry P. Dies Jr., *Guide to the Proper Use of Civilian Intelligence Contractors in the War on Terrorism*, MIL. INTELLIGENCE PROF. BULL., July–Sept. 2007, 23, 24, *available at* http://www.fas.org/irp/agency/army/mipb/2007_03.pdf (last visited Mar. 23, 2011) (bringing to light the important role contractors had in assisting military operations); *see also* AIR FORCE LOGISTICS MANAGEMENT AGENCY, EXPEDITIONARY LOGISTICS 2000: ISSUES AND STRATEGY FOR THE NEW MILLENNIUM 84 (2000) (addressing the advantages in using contractors for military operations and the "contractor on the battlefield" training program).

255. *See* Stephen M. Blizzard, *Contractors on the Battlefield: How Do We Keep from Crossing the Line?*, A.F. J. LOGISTICS, 1, 6 (2004) (attributing the military's reliance on contractors to the growing complexity and sophistication of weapon systems); *see also* Lieutenant General Joseph M. Heiser, *Civilian Combat Support in Vietnam, Some Lessons Learned*, GLOBAL LOGISTICS, 1, 10 (1999) *available at* http://www.scribd.com/doc/1448364/US-Air-Force-global-thinking-global-logistics (last visited Mar. 23, 2011) (defining the military's reliance on contractors as a type of provider of military base infrastructure support).

256. *See* SINGER, *supra* note 249, at 410–11 (noting uncertainty over who would be liable for a war crime committed by an unmanned weapon); *see also* Charles L. Barry & Elihu Zimet, *UCAVs—Technological, Policy, and Operational Challenges*, DEF. HORIZONS, 1, 8 (2001), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA422553 (last visited Mar. 23, 2011) (predicting the potential command and control complications when unmanned systems are designed to respond to their own discrete controllers and unable to respond to a more general authority).

257. *See* SINGER, *supra* note 249 at 410–11 (noting the notion of anonymity involved in aerial attacks); Michael Nas, *Pilots by Proxy: Legal Issues Raised by the Development of Unmanned Aerial Vehicles,* UATAR, 1, 1 (2006), *available at* http://www.uatar.com/Legal%20Paper%20on%20UAVs.pdf (last visited Mar. 23, 2011) (stating that integrating UAVs into civil airspace is a useful and important movement, but thorough consideration needs to be given to the legal issues involved).

258. *See* SINGER, *supra* note 249 at 410 (asserting that commanders are accountable for setting up a legal process determining a chain of command if it leads to war crimes); *see also* Evan Wallach & Maxine Marcus, *Command Responsibility* in INTERNATIONAL CRIMINAL LAW (Cherif Bassouni ed., 2008), *available at* http://www.lawofwar.org/command_ responsibility.pdf (last visited Mar. 23, 2011) (explaining the theory of command and control as the concept of a commander's responsibility for war crimes committed by lower-level troops in his direct chain of command).

259. *See* SINGER, *supra* note 249 at 410; *see also* Canada General Aviation, *The Review and Processing of an Application for a Special Flight Operations Certificate for the Operation of an Unmanned Air Vehicle (UAV) System* (Staff Instruction 2008), *available at* http://www.tc.gc.ca/eng/civilaviation/opssvs/managementservicesreferencecentedocuments-600-623-001-972.htm (last visited Mar. 23, 2011) (stating that Transport Canada is responsible for all of the civil UAVs that it controls and will be held accountable for its actions).

thereby part of the chain of command and deserving of the benefits accompanying POW status.[260]

While the best way to resolve the dilemma over contractors would be to eliminate them from all phases of UAV operation, this does not appear to be feasible in the foreseeable future. Indeed, as a matter of necessity, it is possible that contractors will become *more* involved in UAV operation.[261] Holding military commanders responsible for contractors' actions ensures that someone be responsible for errant UAV attacks,[262] but it does not explain what will happen to the contractors themselves.

One possible solution not sufficiently explored is expanded used of Status of Force Agreements (SOFAs). In some countries, the United States establishes the basis for contractors' existence in a foreign state via a SOFA.[263] This could be perceived as a gap best filled by bilateral treaties making clear the bounds under which U.S. contractors may legally operate in a given country. While the United States has SOFAs for various countries,[264] it should pursue similar agreements regarding contractor status in places where the United States does not permanently station troops. Pakistan would be a prime example of where the United States should aggressively pursue an agreement clarifying the bases under which U.S. contractors would or would

260. Described in *supra* note 145–51 and accompanying text. *See* Michael Guidry & Guy Wills, *Future UAV Pilots: Are Contractors the Solution?*, A.F. J. LOGISTICS, 1, 9 (2004) (indicating the various legal implications that arise from increasing reliance on contractors, such as their status in the context of war); *see also* Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law,* 38 DENV. J. INT'L L. & POL'Y 361, 398-399 (2010) (describing the different complications involved in determining private contractors' legal statuses. For example, on the one hand they are given the power to use deadly force, which interlocks with the definition of spy hackers, who are not given prisoner of war status).

261. *See* Blizzard, *supra* note 255, at 13 (stating that the increased use of technologically sophisticated weapons in Afghanistan and Iraq have led to the increased reliance on contractors to operate UAVs); *see also* Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War, an Inside Look at Brown & Root, the Kingpin of America's New Military-Industrial Complex*, BUS. WK., Sep. 15, 2003, at 7 (stating that the costs associated with using contractors compared to the costs associated with using an internal military source).

262. *See* P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY 410 (2009) (stating that military commanders assuming control would solve the problem of accountability for misguided UAV attacks); *see also* Charlie Savage, *U.N. Report Highly Critical of U.S. Drone Attacks,* N.Y. TIMES, Jun. 2, 2010, at A10 (reporting the U.N.'s criticism on the lack of accountability resulting from U.S military drone attacks and the need for more transparency).

263. *See* Iraq Status of Forces Agreement, *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf (last visited Mar. 23, 2011) (illustrating a standard form between two countries that establishes the purpose and scope of the United States' presence in Iraq); *see also* CRS Congressional Report for Congress, Status of Forces Agreement: What It Is, and How Has It Been Utilized 1, by R. Chuck Mason (2011), http://www.fas.org/sgp/crs/natsec/RL34531.pdf (last visited Mar. 23, 2011) (describing that the purpose of a SOFA contract is to establish the framework under which armed forces will operate in a foreign country).

264. *See* Status of Forces Agreement, *supra* note 263 (presenting a number of contract terms agreed upon by both countries; a standard SOFA agreement with Iraq); *see also* Mason, *supra* note 263 (explaining the background of SOFA agreements and their presence in U.S. military history).

not be given the same protections as regular forces. As Guidry and Wills note, international law has slowly developed the various statuses and protections for various groups.[265] Perhaps one means to begin that process is by small bilateral and multilateral agreements between states giving contractors protections similar to those afforded regular forces. Where this is not possible, the quasi-reserve status suggested by Blizzard, Guidry, and Wills best ensures the likelihood that contractors will not be unlawful combatants.

IV. Conclusion

The increasing use of (and perhaps reliance on) UAVs mandates a close look at the legal implications of these new weapons of war. By removing the risk to a human soldier, these weapons carry with them the potential social consequence of making the decision to go to war "cheaper" for U.S. leaders. The legal consequences, meanwhile, depend on how and where these weapons are used. Whether armed UAV attacks comply with international legal obligations depend, in part, on the premises with which one starts the analysis. Scholars disagree on whether the United States is engaged in "armed conflict" with terrorists. While such a categorization is unconventional, it does perhaps best classify the reality of the intensity level of the conflict. This categorization, moreover, allows for the best compromise between flexibility for armed forces and protection for combatants and noncombatants.

Even though scholars disagree on the legality of Predator attacks in Yemen and Pakistan, an analysis based on proportionality, discrimination, and military necessity shows that these activities likely comply with IHL. Still, the developments in Pakistan must be closely monitored, as legality for today's activities certainly does not imply the legality of future activities. As these are tools of warfare, furthermore, one must bear in mind that the persons operating them may be classified as combatants under the existing IHL rules. Contractors operating UAVs face uncertainty regarding their status under IHL. If the United States continues to employ contractors in a weapon-operating capacity, it must strive to ensure protection for its contractors through bilateral agreements, offering them special status, or through internal military procedures that ensure the UAV operators fall within the chain of command.

Finally, the trend toward increased use of (and perhaps reliance on) UAVs warrants constant reevaluation of specific attacks and perhaps the occasional reminder that virtual war has real consequences. Indeed, the increased reliance on UAVs may well herald the day when they may become overused, and commanders forget that they are first and foremost a tool of war. As such, they must always be used in such a manner compliant with those laws of war that have developed to balance necessary military action with equally necessary protection for human lives.

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265. *See* Guidry & Wills, *supra* note 260, at 13 (calling such developments "a lengthy process"). *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 art. 3 (declaring the international recognition and protection of prisoners of war which applies to soldiers of signatories to the treaties). Whether such SOFAs would be seen as merely protecting contractors under various domestic laws, or ultimately affecting the shape of international law itself, is debatable. This author believes that the unclear nature of contractor statuses in the current UAV context leaves room for further development of IHL.

Victims Violating Defendants: Victim Participation and the Extraordinary Chambers in the Courts of Cambodia

Joseph William Davids*

Introduction

International Law (IL) regarding the participation of victims in criminal trials is not entirely clear.[1] Some confusion in this area of International Human Rights (HR) and International Criminal Procedure is likely caused by at least two factors: (1) the only universally applicable document, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration),[2] is vague and nonbinding;[3] and (2) the diversity of national

1. *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 12, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 5–7 (July 11, 2008) (Pikis, J., dissenting) (dissenting from order permitting out-of-time filing by victims on the ground that the victims have no special interest that would warrant their participation in the proceedings); *see also* Prosecutor v. Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Civil Party Participation in Provisional Detention Appeals, ¶¶ 42–45 (Mar. 20, 2008) (noting that although there is potential for prejudice in having "Civil Parties," or other victims, participate in an appeal against a provincial detention order, the Internal Rules of the ECCC safeguard the procedural rights of the accused sufficiently to counterbalance the potential prejudice); *cf.* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ¶¶ 153–57 (May 13, 2008) (remarking that article 68(3) of the Rome Statute and rules 91 and 92 of the *Rules of Procedure and Evidence* acknowledge that the interests of victims do not always correlate with those of the prosecution, and the articles and rules provide victims with a "meaningful role in criminal proceedings before the court so that they can have a substantial impact in the proceedings").

2. *See generally* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, ¶¶ 1–3, U.N. Doc. A/40/53/Annex (Nov. 29, 1985) (hereinafter Victims Declaration) (outlining the criminal procedural rights of victims regarding access to justice and fair treatment, restitution, compensation, assistance, and remedies in the face of abuses of power).

3. *See* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 652 (Carsten Stahn & Goran Sluiter eds., 2009) (noting the Victims Declaration is ill suited to serve as a framework model for victim participation in criminal proceedings, and the language of the declaration "camouflages" the disagreement among the drafters); *see also* Brianne McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. INT'L L. 127, 130 (2009) (discussing the Victims Declaration as a non-binding document that merely "proposes" guidelines for how nations should address victims' needs and the importance of safeguarding their interests through the judicial process).

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criminal procedure.[4] This article will examine the contents of IL and HR with regard to victim participation and then will turn to different models of criminal procedure to better understand the normative content of the law. The insights from this analysis will be applied to the victim participation regime before the Extraordinary Chambers in the Courts of Cambodia (ECCC)[5] to see to what extent they are or are not consonant.

Part One: Victim Participation, a Permissive Regime

The first question is whether or not and to what extent IL requires or permits victims to participate in criminal trials. The only universally applicable document speaking directly to victim participation is the Victims Declaration.[6] Also relevant in any discussion affecting trial procedures is the International Covenant on Civil and Political Rights (ICCPR),[7] which deals with the minimum requirements of a fair trial.[8] These two documents work to define the limits of victim participation from opposite ends of the spectrum, one setting a minimum and the other a maximum.[9]

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4. *See, e.g.*, *Katanga*, Case No. ICC-01/04-01/07, ¶ 69 (observing that certain criminal procedural practices, such as granting procedural status to victims at the pre-trial stage of a case, may not be wholly consistent with the adversarial approach used in other national systems). *See generally* John Jackson, Towards an International Code of Criminal Procedure and Evidence?, submitted at the 22nd Conference of the International Society for the Reform of Criminal Law, 3–5 (July 11, 2008), *available at* http://www.isrcl.org/Papers/2008/Jackson.pdf (explaining the infeasibility of the idea of a blanket international code of criminal procedure due to unique national legal systems and contextual international criminal justice paradigms that make centralized "one-size-fits-all" criminal procedure standards impracticable).

5. *See* Law of the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (Oct. 27, 2004) (revised translation by the Council of Jurists and the Secretariat of the Khmer Rouge Trial Task Force, Nov. 23, 2004), arts. 33, 36 (2004) (discussing the importance of protection of victims and witnesses and their identities as well as the rights of victims to bring appeals against the decision of the ECCC of the trial court); *see also* Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 6), 23(1)(a) (Sept. 17, 2010) (hereinafter Internal Rules of the ECCC) (outlining the right of victims as civil parties to participate by supporting the prosecution in criminal proceedings against those having committed crimes within the ECCC's jurisdiction).

6. *See* Victims Declaration, *supra* note 2, ¶¶ 4–7; *see also* WAR CRIMES RES. OFF. AM. UNIV. WASHINGTON COLL. OF L., Victim Participation Before the International Criminal Court, INT'L CRIM. CT. LEGAL ANALYSIS EDUC. PROJECT (Nov. 2007), at 2 (discussing the heavy influence that the Victims Declaration had on the drafters of the Rome Statute and the ICC Rules regarding victims' access to "criminal justice mechanisms at both the domestic and international level").

7. *See* International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter ICCPR) (discussing criminal trial procedure and rights of the accused).

8. *See* Lindsay Hoopes, Note, *The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford to Rebalance the U.S. Criminal Justice Equilibrium*, 32 HASTINGS INT'L & COMP. L. REV. 305, 306 (2009) (indicating that the ICCPR requirement of a fair trial can be analogized with the Sixth Amendment of the United States Constitution).

9. The views of victims should only be expressed in a manner that is "without prejudice to the accused." The ICCPR in Article 14 sets out the requirements of a fair and public hearing, that is to say, those things that if affected would prejudice the accused. Therefore, ICCPR and similar rights are those which the Victims Declaration is referring to. *See* Victims Declaration, *supra* note 2, ¶ 6(b); *see also* Hoopes, *supra* note 8, at 306 (indicating that the ICCPR requirement of a fair trial can be analogized with the Sixth Amendment of the United States Constitution).

Right to Be Heard

By its own terms, the Victims Declaration does not require much in the way of victim participation.[10] It requires only that such participation "[a]llow[s] the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected without prejudice to the accused and consistent with the national criminal justice system."[11] In using these terms, the Victims Declaration creates two requirements for victim participation: (1) that personal interests be affected,[12] and (2) that the mode of participation is through the expression of views and concerns.[13] The Victims Declaration was not intended to create a procedural framework for victim participation[14] but only to set requirements that domestic procedures should aspire to incorporate.[15] In any case, the goal of

10. *See* Victims Declaration, *supra* note 2, ¶ 6 (discussing generally the rights of victims and stating that victims are to be informed of their role and scope in judicial and administrative processes); *see also* Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceeding: An Examination Into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 96 (2009) (stating that rather than focusing on the victims, the international criminal courts have been focusing on the accused).

11. *See* Victims Declaration, *supra* note 2, ¶ 6(b).

12. *See* Thomas Howe, Eric Ortner & Allison Surowitz, *In the International Criminal Court: Prosecutor v. Soldier Nationals of Katonia and Ridgeland*, 17 PACE INT'L L. REV. 201, 222 (2005) (explaining that the court must recognize the personal interest of victims rather than simply focusing on punishing the criminal in order to provide justice for victims of international criminal acts); *see also* McGonigle, *supra* note 10, at 113 (asserting that where victims' personal interests are affected, the Court shall allow the victims' views to be considered when appropriate, provided such allowance is not prejudicial to or inconsistent with the rights of the accused).

13. *See* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, ¶ 6(b), U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985) (hereinafter Victims Declaration) (suggesting that victims should be permitted to express their views and concerns at appropriate stages of the proceeding); *see also* CTR. FOR INT'L CRIME PREVENTION, U.N. OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS ON THE USE AND APPLICATION OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER 36–37 (1999) (hereinafter UNODCCP) (observing that the broad language of the Victims Declaration allows victims' views and concerns to be presented in many ways); *see also* Susana SaCouto & Katherine Cleary, *The War Crimes Symposium: Victims' Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 73, 78–79 (2008) (noting that the Victims Declaration emphasizes victims' fundamental right to present their views and concerns to a court).

14. *See* UNODCCP, *supra* note 13, at 20–21 (recognizing that there are many procedural options and discussing approaches taken in different jurisdictions); *see also* Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, 26 HUM. RTS. Q. 605, 655–56 (2004) (identifying different procedural responses to Victims Declaration recommendations).

15. *See* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 652–53 (Carsten Stahn & Goran Sluiter eds., 2009) (explaining that the Victims Declaration gives legislators freedom to implement policies that promote victim participation); *see also* Subhradipta Sarkar, *The Quest for Victims' Justice in India*, 17 HUM. RTS. BR. 16, 16–19 (2010) (pointing to the non-binding nature of the Victims Declaration and calling for India to codify the Declaration's principles into Indian law).

victim involvement is expressed as satisfying an entitlement "to access [. . .] the mechanisms of justice"[16] when appropriate as not to infringe on a defendant's rights in an already functioning criminal justice system.[17]

Even if it were to be assumed that victims were to be allowed to participate as a matter of right in criminal proceedings, a victim's right would still be limited by its relation to his or her "personal interests."[18] The vagueness of "personal interests" has lead to conflicting views being expressed in judicial opinions of the International Criminal Court (ICC),[19] which uses an analogue of the Victims Declaration to govern victim participation.[20] Essentially, the debate surrounds whether or not victims have a "personal interest" in finding the defendant guilty or innocent and in what manners they may express their "views and concerns."[21] Since the ICC

16. *See* Victims Declaration, *supra* note 13, ¶ 4 (offering suggestions for promoting victims' access to justice and fair treatment).

17. *See* Anne-Marie de Brouwer & Marc Groenhuijsen, *The Role of Victims in International Criminal Proceedings*, *in* INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 149, 152 (Goran Sluiter & Sergey Vasiliev eds., 2009) (emphasizing that preserving the defendant's right to a fair trial has always been an important consideration in the victims movement); *see also* McGonigle, *supra* note 10, at 107 (indicating that although the International Criminal Court has a renewed focus on victim participation, it maintains the primary objective of protecting defendants' right to an impartial, efficient proceeding).

18. *See* Victims Declaration, *supra* note 13, ¶ 6(b) (stipulating that victims' participation in criminal proceedings is appropriate where personal interests are at stake); *see also* Hakan Friman, *Participation of Victims in the ICC Criminal Proceedings and the Early Jurisprudence of the Court*, *in* INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW, *supra* note 17, at 205, 218–19 (discussing whether "personal interests" should be generalized or more narrowly defined to meet the specific needs of victims); *see also* Hector Olasolo, *Systematic and Casuistic Approaches to the Role of Victims in Criminal Proceedings Before the International Criminal Court*, 12 NEW CRIM. L. REV. 513, 517–18 (2009) (addressing the International Criminal Court's discretion in determining when and how victims should participate in proceedings affecting their personal interests).

19. *See* McGonigle, *supra* note 10, at 114 (recognizing that personal interests is not defined, and judges must decide on an individual basis, which leads to differing results); *see also* Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 794 (2008) (discussing how vagueness in terms, such as "personal interests," results in debate between judges and parties regarding their interpretations of the terms).

20. *See* Vasiliev, *supra* note 15, at 652 (remarking that the Victim Declaration, while not legally binding, served as the authority for the ICC provision on victim participation); *see also* SaCouto & Cleary, *supra* note 13, at 89 (describing how the ICC used the Victims' Declaration as a primary reference for its definitions on victim participation that was supported by most delegations).

21. *See* Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?,* 6 NW. U. J. INT'L HUM. RTS. 459, 509 (2008) (alleging that a central aspect in the debate surrounding victim participation is the lack of meaningful participation by victims in terms of their "views and concerns"); *see also* Trumbull, *supra* note 19, at 793–94 (exemplifying how lacking definitions for both "personal interests" and "views and concerns" has caused debate among involved parties including judges whose interpretations of such terms are often influenced by individual views on victim participation).

uses an analogue of the Victims Declaration, its case law may shed light on the meaning of the Victims Declaration.

Pre-Trial Chamber I has very clearly announced that

> the issue of the guilt or innocence of persons prosecuted before [the ICC] is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth.[22]

This is a very "inquisitorial" or "civil law"[23] way of looking at victim participation drawing from "those systems [. . .] based on only one comprehensive investigation that is carried out by the organ of state vested with investigative powers" for the confirmation of charges phase.[24] This will be important later when considering basic procedural protections of defendants at HR. At least one judge of the Appeals Chamber felt otherwise, writing, "[I]t is not the victims' domain either to reinforce the prosecution or dispute the defense"[25] as "[t]he proof or disproof of the charges is a matter affecting the adversaries. The victims have no say in the matter."[26] This position seems to put more weight on the "adversarial" nature of the hearing,[27] and so uses a more "common" or "Anglo-American" approach to the subject.[28] Also, from a more textual point of view, it has been suggested that the inclusion of the word "personal" was meant to ex-

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22. *See Katanga*, Case No. ICC-01/04-01/07, ¶ 35 (considering the issue of guilt versus innocence by a single judge in the proceeding and its effect on procedural status of a victim).

23. *See* Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?,* 3 INT'L CRIM. L. REV. 1, 2 (2003) (explaining the differences in the inquisitorial terminology and why it is likely to be inappropriate).

24. *See Katanga*, Case No. ICC-01/04-01/07, ¶ 61 (quoting one viewpoint of victim participation based on only a single comprehensive investigation).

25. *See Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 and OA 10, ¶ 13 (Pikis, J., dissenting) (deciding that victims are allowed to participate in criminal proceedings).

26. *See id.* at ¶ 19 (holding that the victims' participation should not prejudice the rights of the defendant).

27. *See* Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1425 (2001) (comparing the significance of victim participation between adversarial and inquisitorial models); *see also* Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 13 (2005) (discussing the victim's limited role in criminal proceedings to ensure the adversarial nature of the tribunal).

28. *See* Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceeding: An Examination Into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 97 (noting that although the ICC has employed several models of procedure, proceedings are now largely adversarial). *See generally* Joachim Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 127, 128 (1996) (discussing the characteristics of the adversarial system used in criminal tribunals throughout Europe).

clude the general societal interest in the guilt or innocence of the defendant that is already being attended to by the prosecution.[29]

The second issue, scope of "views and concerns," is equally ill defined.[30] Article 68(3) of the Rome Statute makes victim participation mandatory where their personal interests are affected.[31] However, when the Appeals Chamber ruled on the issue of victims offering evidence tending to prove the guilt of the defendant, it did so relying on a procedure based on Article 69(3) that gives the court the authority to request "the submission of all evidence that it considers necessary for the determination of the truth."[32] The Appeals Chamber came to a similar conclusion concerning challenges to the admissibility of evidence made by victims relying on the power of the Trial Chamber to rule on admissibility based on its own motion.[33] This reading of the Rome Statute is by no means unanimous and the decision itself was a bit equivocal about the nature of victim participation.[34] Finally, the "dominant interpretation of the original expression 'views and concerns' [. . .] provides no basis for granting victims [the power to offer evidence about guilt or innocence]."[35] This interpretation is also consistent with the fact that

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29. *See* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 665–68 (Carsten Stahn & Goran Sluiter eds., 2009) (explaining the debate surrounding the meaning of "personal" interests and how the ICC struggles to limit victim participation to prevent prejudice to the defendant); *see also* Chung, *supra* note 21, at 463 (indicating that although victims are allowed to make a presentation reflecting personal interests during the proceeding, the court limits the content to prevent prejudice toward the defendant).

30. *See* Mariana Pena, *Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. INT'L & COMP. L. 497, 503 (2010) (noting that although victims are allowed to share their "views and concerns," there is no guide to how to implement victim participation); *see also* Trumbull, *supra* note 19, at 793 (stating that "views and concerns" is vague and the Rome Statute provides no instruction on how to incorporate such participation in criminal proceedings).

31. *See* Rome Statute of the International Criminal Court art. 68(3), July 1, 2002, 2187 U.N.T.S 90 (hereinafter Rome Statute) (authorizing the Court to allow victims to present their views and concerns at various stages of the proceedings when the victim's personal interests are affected).

32. *See* Rome Statute, *supra* note 31, art. 69(3) (granting the Court authority to request all evidence it deems necessary to ascertain the truth); s*ee also Lubanga Dyilo,* Case No. ICC-01/04-01/06 OA 9 OA 10, ¶ 98 (leaving open the possibility for victims to request the admission of all evidence it considers necessary to ascertain the truth at trial).

33. *See Lubanga Dyilo,* Case No. ICC-01/04-01/06 OA 9 OA 10, ¶ 101 (using the power granted under art. 64(9), the Trial Chamber asserts its power to rule on the admissibility and relevance of evidence on its own motion).

34. *See* Vasiliev, *supra* note 29, at 654 (showing how the Appeals Chambers is divided on whether victims can offer evidence that establishes the guilt of the accused); *see also* Miriam Cohen, *Victims' Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT'L L. & POL'Y 351, 364 (2009) (stating how the Court uses a case-by-case basis to determine the application of article 68(3)).

35. Vasiliev, *supra* note 29, at 654 (noting how nowhere in the ICC does it give victims the right to offer evidence about the guilt or innocence of the accused).

there are legal systems that do not allow victims to offer evidence at trial.[36] If such practice were not consonant with the Victims Declaration, all States employing that system would be in violation of their obligations vis-à-vis victims.[37] As such, the Victims Declaration should not be read as mandating an ability on the part of victims to offer evidence.[38]

The takeaway is that IL and HR cannot be seen as mandating victims be given a chance to participate on the issue of the guilt of the accused;[39] this is even if guilt is to be regarded as a "personal interest."[40]

Equality of Arms

The ICCPR[41] is a generally applicable binding treaty that deals in part with the procedural rights of criminal defendants.[42] One of the cornerstone concepts contained, although not

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36. *See* Scott T. Johnson, *Victim Participation in the International Criminal Court: Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court,* 16 ILSA J. INT'L & COMP. L. 489, 490 (2010) (describing that, in common law systems, victims' participation does not exist in criminal proceedings); *see also* Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 781 (2008) (explaining that common law jurisdictions often limit a victim's role to that of witness).

37. *See generally* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1444 n.246 (2002) (explaining obligations under most legal systems regarding incarceration mechanisms); *see* Subhradipta Sarkar, *The Quest for Victims' Justice in India*, 17 HUM. RTS. BR. 17 (2010) (discussing general obligations owed by States to victims under international human rights law instruments, including observance of codes of conduct and ethical norms).

38. This is supported by the Appeals chamber opinion in *Lubanga* not finding such a right in the Rome Statute, which as mentioned, uses an analogue of the Victims Declaration. *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals from the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 66 (July 18, 2008) (explaining that the Appeals Chamber found, similar to the Rome Statute, that the Victims Declaration does not mandate an opportunity for victim participation); *cf.* Galu v. Attias, 923 F. Supp. 590, 593 n.3 (S.D.N.Y. 1996) (demonstrating a federal court's refusal to allow a victim to present evidence by way of a competency hearing, denying cross-motion to oppose a competency hearing, thus denying victim's participation in her own proceedings).

39. *See* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 654 (Carsten Stahn & Goran Sluiter eds., 2009) (reporting the dominant view that the UN Declaration does not grant the right of victim participation); *see also* Trumbull, *supra* note 36, at 799 (discussing the reasons why victims are not permitted to submit evidence in support of either prosecution or defense).

40. *See* Miles v. United States, 103 U.S. 304, 309 (1880) (citing a jury charge that qualified guilt as a "personal interest"); *see also* Rod Rastan, *Review of ICC Jurisprudence 2008*, 7 NW. U. J. INT'L HUM. RTS. 261, 281 (2009) (reiterating the position that guilt is a personal interest and justifying the limitation on which victims may participate in certain trials).

41. *See generally* SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY (2d ed. 2004) (explaining the responsibilities of the committee to carry out the work of the ICCPR).

42. *See* International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter ICCPR) (setting forth the rights of criminal defendants); *see also* Juliana Murray, Comment, *Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals*, 10 CHI. J. INT'L L. 769, 777 (2010) (explaining that article 14 of the ICCPR articulates the rights of criminal defendants).

explicitly, in article 14 is the right to an "equality of arms" for all parties before the tribunal.[43] The only time deviation may be made from this principle is when it is based on law and not unfair to the defendant.[44] While the idea of balance between the parties would imply to the "common" lawyer that a balance must be maintained between the prosecution and the defendant,[45] systems do exist where victims are given status as parties to the case—most notably, for our purposes, the ECCC.[46] However, when the Human Rights Committee discusses criminal procedure, no mention is made of victims.[47] They refer to the prosecution and defense as part

43. *See* ICCPR, *supra* note 42, art. 14 (explaining that all individuals have the right to equality before the tribunals); *see also* U.N. Human Rights Comm. (HRC), *General Comment No. 32: Article 14 Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 8, U.N. Doc. CCPR/C/GC (Aug. 23, 2007) (hereinafter Right to Equality) (stating that equality of arms is an integral part of the right to equality before courts).

44. *See* Right to Equality, *supra* note 43, ¶ 13 (stating that the right to equality of arms can be subject to an exception if based on law and not unfair to the defendant); *see also* Human Rights Committee, Communication No. 1347/2005 on its 90th Sess., July 9–July 27, ¶ 7.4, U.N. Doc. CCPR/C/90/D (Aug. 29, 2007) (explaining that it is the state's obligation to prove that any procedural inequality has an objective foundation and is not unfair to the defendant).

45. *See* U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, 46th Sess., *The Administration of Justice and the Human Rights of Detainees*, Annex II, ¶ 55, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994) (prepared by Stanislav Chernichenko & William Treat) (stating that equality of parties entails procedural equality between the prosecution and defense and providing specific examples); *see also* MALGORZATA WASEK-WIADEREK, THE PRINCIPLE OF "EQUALITY OF ARMS" IN CRIMINAL PROCEDURE UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS FUNCTIONS IN CRIMINAL JUSTICE OF SELECTED EUROPEAN COUNTRIES 23 (2000) (affirming that inherent in the equality of arms is the procedural equality between the prosecution and the accused).

46. Just in case that was not complicated enough, there are also multiple ways for the victims to be parties to the proceedings. Sometimes they are the prosecutors and sometimes they are just civil parties. *See* Vasiliev, *supra* note 39, at 679–84 (offering a survey of participatory modes); *see also* Vittime Dei Reati, *La Vittima Del Reato Nel Processo*, *available at* http://www.camera.it/cartellecomuni/leg15/Rapporto AttivitaCommissioni/testi/01/01_cap26_sch01.htm (last visited Mar. 21, 2011) (explaining that in the Italian system, victims don't have a significant place in the proceeding); *see also* Juri Monducci, *Il ruolo della vittima del reato nel procedimento penale ai fini del risarcimento del danno non patrimoniale*, 3 RIVISTA DI CRIMINOLOGIA 32, 33 (2009) (discussing the importance of the victim in relation to the prosecutor).

47. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 (stating that the Human Rights Committee should be able to receive and consider information from victims of violations of the International Covenant on Civil and Political Rights); *see also* Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 345–46 (2001) (explaining that while victims are not explicitly mentioned in the covenant, the Optional Protocol allows the committee to deal with victims).

of a binary pair.[48] The same is true for other sources discussing the right to "equality of arms" in criminal and other proceedings.[49]

The lack of reference to victim participation is disturbing, especially considering the language used for "equality of arms" between the parties.[50] If all "parties" are to have equal resources and access to the court to present evidence or appeal a type of decision,[51] then a defendant in a criminal case may likely face two prosecutors at the same time.[52] At the very least there is the possibility that the defendant will face multiple "parties" who would like to see him or her convicted of the charges.[53] The balance of power would be shifted in favor of one side (presumably the one with more participants, in this case the side seeking conviction),[54]

48. Some examples, "There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision" (para. 14); "'Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory" (para. 33); "As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution" (para. 39). No mention is made to victims or a third actor with a similar duty or right. *See* Right to Equality, *supra* note 43, ¶¶ 13, 14, 33, 39.

49. *See* Dombo Beheer B.V. v. The Netherlands, App. No. 14448/88, 18 Eur. Comm'n H.R. Dec. & Rep. 213, 227 (1993) (recognizing that each party has the right to present his case in a manner that does substantially disadvantage his case against his opponent); *see also* MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 239–40 (1993) (explaining that equality of arms pertains to the fairness between the plaintiff and respondent in civil trial and the prosecutor and the defendant in criminal matters).

50. *See* U.N. Human Rights Comm'n (HRC), *supra* note 43, at 913 (stating that equality of arms is ensured through the shared procedural rights of the parties). *See generally* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV 203, 204 (2006) (claiming that there is little literature and focus on victims in many disciplines of law, including international law and human rights law).

51. S*ee supra* note 48; *see also* Martha F. Davis, *In the Interest of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 162 (2009) (recognizing the Human Right Committee's emphasis on equality to the parties in the courts in ICCPR Article 14).

52. *See* Bradley E. Berg, *The 1994 I.C.L. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, 28 CASE W. RES. J. INT'L L. 221, 251–52 (1996) (reasoning that because of the prosecution's right to appeal the finality of a decision is never certain and the accused could be tried repeatedly); *see also* Lorraine Finlay, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statut*e, 15 U.C. DAVIS J. INT'L L. & POL'Y 221, 225 (2009) (noting that according to ICCPR, art 14(7) does not prohibit the reopening cases in different jurisdictions).

53. *See* Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT'L L.J. 197, 223–24 (2001) (providing that international law allows multiple prosecutions by different nations because one nation's decision in a criminal matter is not binding on other nations); *see also* Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307, 342 (2002) (discussing that the international concept of double jeopardy applies only within the same country which allows for prosecution in multiple national jurisdictions).

54. *See* United States v. Rashed, 234 F.3d 1280, 1285 (D.C. Cir. 2000) (stating in dicta the consequences of multiple prosecutions by different jurisdictions likely increase the probability of winning a conviction); *see also* Beth M. Bollinger, *Defending Dual Prosecutions: Learning How to Draw the Line*, 10 CRIM. JUST. 16, 16 (1995) (reasoning that overlapping prosecutions affect criminal defendants more and can lead to unfair results).

and the truth-seeking exercise would be compromised if fully implemented in a subjective "adversarial" truth-finding contest.[55] Even proponents of extensive victim participation at the ICC have recognized this possibility.[56]

From these data points we can take away that some kind of victim involvement does not violate the rights of the defendant.[57] The extent and type of victim involvement that is proper will likely be less the more "adversarial" the proceedings are.[58] As a logical consequence, it is also likely that the less "adversarial" and more "inquisitorial" the proceedings, the participation will be more valid.[59] There is very little case law on what the proper boundaries are for victim participation in the two major types of systems in the world.[60] But if we start from the position that the systems that do exist are acceptable (as in they meet the minimum and do not exceed the maximum), we can use these systems to ascertain the contours of what is acceptable.

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55. *See* Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?,* 3 INT'L CRIM. L. REV. 4 (2003) (distinguishing between subjective and objective truth finding, referred to as procedural rather than material); *see also* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 924 (1996) (criticizing the prosecutor's role in an adversary system as an advocate rather than a neutral party).

56. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07 OA 8, Prosecution's Response to Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber, ¶¶ 36–37 (Sept. 25, 2009*)* (explaining that certain criminal procedure mechanisms are not consistent with the adversarial approach used in other national systems); *see also* Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 280 (2007) (noting that victim participation may result in unfair prejudice and violate defendant's rights).

57. *See* Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination Into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 120 (2009) (indicating that victim participation may be presented in a manner that is neither prejudicial nor in violation of the defendant's rights). *But see* Christopher R. Goddu, *Victim's "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 247 (1993) (characterizing victims' rights inside courtrooms as prejudicial to defendants).

58. *See* Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 273 (2008) (devaluing the victim's participation at trials because it undermines the adversarial process); *see* Jouet, *supra* note 56, at 254 (focusing on the benefits of victim participation in inquisitorial proceeding).

59. *See* Kate Yesberg, *Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal,* 40 VICTORIA U. WELLINGTON L. REV. 555, 568 (2009) (explaining the integral roles that victims play in inquisitorial proceeding and their ability to further truth-finding efforts). *See generally* James W. Diehm, *The Introduction of Jury Trials and Adversarial Elements Into the Proper Soviet Union and Other Inquisitorial Countries*, 11 J. TRANSNAT'L L. & POL'Y 1, 13 (2001) (describing the freedom that a victim has during court proceedings that are not adversarial).

60. *See* Jouet, *supra* note 56, at 254 (illustrating the blending of inquisitorial and adversarial techniques by showing how victims sometimes act as private prosecutors). *See generally* Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 698, 703 (2010) (stating that in international criminal courts, inquisitorial influences are combined with adversarial procedures because lawyers from both systems present the cases).

Part Two: Adversarial Versus Inquisitorial[61]

There are different models for victim participation in criminal proceedings,[62] and the use of these different models may depend on the nature of the court's procedure.[63]

The Trial: A Contest of Wills or an Objective Search for the Truth?

Some writers have noted that one of the major differences between the adversarial and inquisitorial models is a "one-case approach" as opposed to a "two-case approach."[64] For our purposes, the biggest issues are the manner in which evidence is introduced at trial and the source of that evidence. In predominately inquisitorial models of criminal procedure, the evidence for trial is collected beforehand and placed in a "dossier" that is distributed to all the parties and the court, eliminating any need for disclosure rules between the parties.[65] Also typical of this procedural model is the duty of the prosecution to investigate exculpatory evidence as

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61. *See* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 127 (3d ed. 2007) (characterizing the inquisitorial-adversarial dichotomy as "inaccurate" when applied to modern criminal procedure in civil law jurisdictions); *see also* Ambos, *supra* note 55, at 3–4 (summarizing the historical meanings of the adversarial and inquisitorial systems and demonstrating that both models are "equally accusatorial" in modern criminal procedure).

62. *See* Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 6), 23(1)(a) (September 10, 2010) (hereinafter Internal Rules of the ECCC) (establishing victim participation in prosecution of criminal matters and in separate civil claims); *see also* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 681–85 (Carsten Stahn & Goran Sluiter eds., 2009) (breaking participation into parts such as being a civil party, participating in the prosecution, and making victim impact statements); *see also* Brianne McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. INT'L L. 137 (2009) (breaking participation up into three types: "(i) submitting and/or reading victim impact statements; (ii) participating as a civil party; and (iii) participating as a private, subsidiary or auxiliary prosecutor").

63. It should be noted that participation as a Parte Civile (for example, Codice di Procedura Penale (C.P.P.) art.76 (It.)) is mostly contained to civil law systems as is victim participation as an auxiliary prosecutor aiding the prosecution. *See* Vasiliev, *supra* note 62, at 681–85 (discussing victim participation in private, secondary and auxiliary forms of prosecution); *see also* Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219, 235 (2006) (advocating for victim participation in pre-trial confirmation hearings).

64. *See* Ambos, *supra* note 55, at 4 (explaining procedural differences between parties' participation in adversarial and inquisitorial systems); *see also* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1439, 1449 (Antonio Cassese et al., eds. 2002) (contrasting defendant's obligation to produce evidence in the "two-case" adversarial system with relative freedom to offer evidence in "one-case" inquisitorial system).

65. *See* Ambos, *supra* note 55, at 15 (stating that defense access to dossiers simplifies pre-trial procedure); *see also* Gillian Higgins, *Fair and Expeditious Pre-Trial Proceedings: The Future of International Criminal Trials*, 5 J. INT'L CRIM. JUST. 394, 396 (2007) (promoting establishment of an independent investigatory board that would produce dossiers to both parties during the pre-trial stage of war crime prosecutions).

well as inculpatory evidence.[66] As such, the "case" has been investigated from both perspectives (inculpatory and exculpatory),[67] and all the relevant evidence has been collected in the "dossier" given to all parties/actors involved in the criminal proceeding before the start of trial.[68] It should also be noted that the judges in an inquisitorial model may, and do, actively question witnesses and ask to see additional evidence.[69] The nature of party interventions is also an important characteristic. In an inquisitorial model, the parties assist the court in its fact-finding endeavor and are not themselves the main engine behind the discovery of the truth.[70]

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66. *See* Rome Statute of the International Criminal Court art. 54(1)(a), July 1, 2002, 2187 U.N.T.S 90 (hereinafter Rome Statute) (mandating ICC prosecutor's duty to investigate both "incriminating and exonerating" evidence); *see also* Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 9 n.45 (2003) (citing Prosecutor v. Kupreskic, Case No. IT-95-16-T, Decision on Communications Between the Parties and Their Witnesses, (Sept. 21, 1998)) (quoting,

> the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting).

67. *See* Allard Ringnalda, *Inquisitorial or Adversarial? The Role of the Scottish Prosecutor and Special Defences*, 6 UTRECHT L. REV. 119, 120 (2010) (describing the inquisitorial procedure to require investigation of both incriminating and exculpating evidence in order to make objective judgments); *see also* Kweku Vanderpuye, *Traditions in Conflict: The Internalization of Confrontation*, 43 CORNELL INT'L L.J. 513, 519 (2010) (noting that in continental proceedings, the judicial or prosecutorial official responsible for compiling information must collect both incriminating and exculpatory evidence).

68. *See* Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 467 (2009) (indicating that in the French inquisitorial system, the "dossier" contains all relevant information pertaining to a case); *see also* Vanderpuye, *supra* note 67, at 518–19 (explaining that the dossier documents all evidence found during the investigative phase including, but not limited to, witness interrogations, police reports, physical evidence, and expert reports).

69. *See* Orie, *supra* note 64, at 1444 (establishing that in his truth-seeking role, the judge interrogates witnesses and the accused, and may order evidence to be produced during inquisitorial trials); *see also* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 525, 545 (1973) (differentiating inquisitorial procedure from adversarial procedure in that the presiding judge typically begins the examination of witnesses and decides what evidence to examine).

70. *See* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1444 (Antonio Cassese et al., eds. 2002:

> In the inquisitorial system the judge is actively seeking the truth at trial. He will interrogate the accused and the witnesses, the latter having taken an oath. He may order evidence to be produced in court and is in control of the proceedings. The parties, although entitled to put forward evidence and to examine the witnesses, play a supplementary role making submissions to the court for evidence to be heard additionally.

See also Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1193 (1992) (describing the roles of the parties in the inquisitorial model as being secondary and supportive to the judge, who is primarily responsible for gathering and determining the relevance of evidence).

Adversarial models of criminal procedure do not have anything like a "dossier" that is provided to all the parties with each party responsible for its own investigations.[71] The consequence is that "disclosure rules are a clear expression of the adversarial model since its 'two case approach' makes [mutual] disclosure necessary to ensure that both parties have the same level of information."[72] As such, the parties are the exclusive source of evidence;[73] consequently, the more parties to a proceeding, the more sources of evidence that there will be.[74] In fact, the accuracy of the result of competition between the defense and the prosecution is the underlying assumption of the adversarial model.[75] This is in contrast to the inquisitorial model where essentially the number of sources (the dossier) remains the same no matter how many parties there are to the proceeding.[76] In adversarial models there is also little room for judges to engage in questioning witnesses or requesting evidence, as they are theoretically to be more like

71. *See* Sharon Finegan, *supra* note 68, at 467 (identifying each party's control of its own investigation as well as the judge's reliance on those investigations to be a hallmark of the adversarial system); *see also* Ringnalda, *supra* note 67, at 121 (remarking that a fair criminal trial in an adversarial system demands that the parties have equal rights to investigate and present the case, which is at odds with inquisitorial procedure that utilizes a dossier).

72. *See* Ambos, *supra* note 66, at 15 (reasoning that disclosure rules are a distinguishing characteristic of the adversarial system because they are generally not considered necessary in inquisitorial systems involving a dossier); *see also* Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 82 (2010) (distinguishing adversarial systems from inquisitorial systems in that all available evidence is gathered through inquisitorial proceedings, while adversarial proceedings involve two versions of the event as presented by either side).

73. *See* EDITH GREENE ET AL., WRIGHTSMAN'S PSYCHOLOGY AND THE LEGAL SYSTEM 34 (Michelle Sondi, ed. 2007) (stating that the production and presentation of evidence in the adversarial system is left to the parties); *see also* F. Andrew Hessick III & Reshma Saujan, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 222 (2002) (stating that in the adversarial system, the fact finder reviews the evidence submitted by the parties).

74. *See* THEODORE L. KUBICEK, ADVERSARIAL JUSTICE, AMERICA'S COURT SYSTEM ON TRIAL 102 (2006) (stating that the parties are responsible for the production and policing of evidence in the adversarial system); *see also* Hessick & Saujan, *supra* note 73, at 222 (explaining that the adversarial system results in evidence being submitted by the parties and reviewed by the judge or jury).

75. *See* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1443 (Antonio Cassese et al., eds. 2002) (stating that the parties control the adversarial process and that the tension between the parties defines the adversarial system); *see also* Russell G. Pearce, *Deborah L. Rhode's Access to Justice: Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help,* 73 FORDHAM L. REV. 969, 971 (2004) (stating that the adversarial system relies on the competitive nature of the parties in asserting their own self-interests).

76. It should be noted that the parties in an inquisitorial model may still call witnesses and introduce evidence at trial. However, the existence of a dossier drastically alters the process by establishing what evidence there is ahead of the trial and limits the parties to serving as a frame of reference for the proceedings. *See* Orie, *supra* note 75, at 1444 (stating that in the inquisitorial system, the judge plays an active at trial, with the parties playing a supplementary role); *see also* Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1019 (1974) (stating that the dossier is a result of the pre-trial process, composed of written materials compiled earlier by an investigating magistrate).

"umpires" and simply referee the legal contest between equals.[77] This removes an eloquent solution for victim participation through the judges.[78]

Victim Participation in Both Civil and Common Law Systems

As mentioned above, there are multiple ways for victims to participate in criminal trials. The absolute minimum would be the right to offer "victim impact statements" during sentencing.[79] The highest level of participation would be either a private/secondary prosecution[80] or an auxiliary prosecution.[81] At least for our purposes there is little difference between the private/secondary prosecution and a normal prosecution without any victim participation in that the defendant will be facing only one accuser-party at a time, namely, the prosecutor or the victim as prosecutor.[82] In this sense there is no impact on the "equality of arms," at least as far as the number of parties on each side of the guilt/innocence divide is concerned.[83] By contrast,

77. *See also* Orie, *supra* note 75, at 1439, 1443 (accentuating the passive role of the judge in the adversarial system); *see also* Pearce, *supra* note 75, at 971 (comparing the role of judges as the center of the inquisitorial system, with their role in the adversarial system, as merely a neutral umpire).

78. *See* EDITH GREENE ET AL., *supra* note 73, at 34 (implying that in the adversarial system, it is the parties, not the judge, who actively participate in the presentation of the case, thereby limiting the interaction between the judge and the victim which is characterized in the inquisitorial system); *see also* Honorable Jeffrey S. Wolfe and Lisa B. Prosze, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer,* 33 TULSA L.J. 293, 296 (1997) (stating that in the adversarial system, it is the plaintiff's role, not the court's, to meet the burden of proof and assert the claims of the case).

79. For a brief description of this practice, *see* STEVEN E. BARKAN & GEORGE J. BRYJAK, FUNDAMENTALS OF CRIMINAL JUSTICE, A SOCIOLOGICAL VIEW 416 (Cathleen Seether ed., 2011) (describing how victim impact statements allow the victim in a criminal trial to tell the judge how their victimization has affected their lives); *see also* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 684–85 (Carsten Stahn & Goran Sluiter eds., 2009) (describing the practice of victim impact statements). For obvious reasons, this type of participation is not a primary concern of this article.

80. *See* Prosecution of Offenses Act, 1985, c. 23, 6(1) (Eng.) *available at* http://www.legislation.govuk/ukpga/1985/23/section/6) (last accessed Mar. 21, 2011) (implying that any person can institute criminal proceedings); *see also* Vasiliev, *supra* note 79, at 684 (stating that a secondary prosecution is where the public prosecutor decides not to prosecute and/or terminate the criminal proceedings and the victim takes over the prosecution).

81. *See* Vasiliev, *supra* note 79, at 684 (defining the role of an auxiliary prosecutor as one which entitles the victim to play a very active role in the trial, while the public prosecutor does a bulk of the prosecution); *see also* Brianne McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. INT'L L. 127, 130 (2009) (describing the limited role of auxiliary prosecutors which provides for the increased participation of victims); *see also* Juri Monducci, *Il ruolo della vittima del reato nel procedimento penale ai fini del risarcimento del danno non patrimoniale*, 3 RIVISTA DI CRIMINOLOGIA 32, 33 (2009) (stating that there is also the right to be heard on issues of closing a case/decision, to prosecute, and other rights of the victims to influence the prosecutor).

82. *See* LORRAINE WOLHUTER ET AL., VICTIMOLOGY: VICTIMISATION AND VICTIMS' RIGHTS 192 (2009) (inferring that when the victim acts as the prosecutor, she takes on a separate role and does not act concurrently with the attorney prosecutor); *see also* McGonigle, *supra* note 81, at 138 (explaining that in private/secondary prosecution, the victim acts as the prosecutor).

83. *See* Stefania Negri, *Equality of Arms: Guiding Light or Empty Shell?, in* INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 13, 13 (2007) (emphasizing that the "equality of arms" is a necessary element in due process in that it ensures both parties a reasonable opportunity to be heard); *see also* Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, 28 FORDHAM INT'L L.J. 1566, 1566 (2005) (explaining the importance of ensuring the equality of arms in criminal prosecutions).

the defendant will face two separate parties as accusers where the victim serves as an "assistant" to the prosecutor by participating as an additional party to the proceedings.[84]

Two factors make a difference in regard to the principle of "equality of arms" between the civil law and common law traditions: (1) much of the evidence to be used at the case is in the dossier, which is available to all parties;[85] and (2) there is a professional judge using that dossier and the parties to undertake an independent fact-finding evaluation.[86] On the first point, an independent body whose job it is to collect both inculpatory evidence and exculpatory evidence collects the information that is to be used as evidence at trial.[87] All parties have access to the exact same material and will be making arguments from that material, meaning there is no need for disclosure rules, and there is no surprise at trial.[88] The second point builds on this foundation. The judge in the inquisitorial court may, and does, ask that new evidence be provided.[89] Add to this the fact that the parties are not responsible for discovering the truth but the court is,[90] and the idea that the trial is not divided into "defense" and "prosecution" cases but is only one case being investigated by the court.[91] The result is that victim participation

84. This is the kind of role envisaged by the ECCC rules. *See* Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 6), 23(1)(a) (September 10, 2010) (hereinafter Internal Rules of the ECCC) (providing that the role of a victim in criminal proceedings is to participate by supporting the prosecution); *see also* Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 779 n. 3 (2008) (recognizing the role given to victims by the ECCC as affording victims participatory privileges more broad than any existing international tribunal).

85. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1429 (2010) (noting that common law procedure differs from the civil law approach involving a "dossier" in which all information is collected through a nonpartisan investigation); *see also* Rupert Skilbeck, *Frankenstein's Monster: Creating a New International Procedure*, 8 J. INT'L CRIM. JUST. 451, 459 (2010) (differentiating civil law systems from common law systems in that usually civil law cases are based on comprehensive dossiers prepared in advance of trial).

86. *See* Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 83 (2010) (noting that the role of the civil law judge is more active than the common law judge's more neutral role); *see also* Skilbeck, *supra* note 85, at 459 (distinguishing civil law systems from common law systems whereby civil law systems usually involve trials by a professional judge rather than by a jury).

87. *See* Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 9 n.45 (2003); *see also* Kweku Vanderpuye, *Traditions in Conflict: The Internalization of Confrontation*, 43 CORNELL INT'L L.J. 513, 519 (2010) (maintaining that in continental proceedings, the official responsible for compiling information must collect both incriminatory and exculpatory evidence).

88. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-trial Stage of the Case, ¶ 65 (May 13, 2008) (demonstrating that victims have access to all evidence proposed by the prosecution and defense, as well as the ability to propose their own); *see also* Ambos, *supra* note 87, at 15 (concluding that the civil law dossier takes on the function of common law disclosure rules).

89. *See*, *e.g.*, Codice di Procedura Penale (C.P.P.) art. 507 (It.) (stating the judge has discretion in allowing and requesting new evidence); *see also* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1444 (Antonio Cassese et al., eds. 2002) (explaining the judge's substantial participation in pre-trial evidentiary collection).

90. *See* Orie, *supra* note 89, at 1444 (differentiating between role of pre-trial magistrates in accepting evidence and trial judges in evaluating evidence); *see also* P.J. SCHWIKKARD, POSSIBILITIES OF CONVERGENCE 13 (2008) (opining that truth finding process is "judge centered" in inquisitorial systems).

91. *See* Orie, *supra* note 89, at 1449 (describing the defendant's freedom to confront evidence collected by judges in a "one-case approach" to the inquisitorial system); *see also* Ambos, *supra* note 87, at 15 (discussing prosecutor's role of investigating both "incriminating and exonerating" evidence in "one case" model).

tending to show the guilt of an accused is not as unbalancing as in an accusatorial setting where the neutral court's role is increased and the partisan prosecutor's is decreased.[92] In other words, the court already has the authority to ask for, and in many cases will already have the basis for seeking, the evidence that would be supplied or indicated by the victims at trial.[93] There is also the added fact that the primary job of the parties, other than supplementing the record, is to offer "observations and to present their opinion as to the conclusions to be drawn from the investigation by the judge," not make their case.[94]

The reverse would also seem to hold true. In a situation where the parties have the primary responsibility to produce evidence for the fact finder, more resources producing evidence would seem to tip the scales against the defendant.[95] So much was hinted at by Judge Steiner when she wrote that

> the procedural status granted to victims [. . .] in a number of national systems from the Romano-Germanic tradition may not be necessarily consistent with the "wholly adversarial approach" to criminal proceedings embraced in a number of national jurisdictions belonging to the common law tradition, as well as with the manner in which these national jurisdictions have elaborated on the right to a fair trial.[96]

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92. *See* Rome Statute of the International Criminal Court art. 68(3), July 1, 2002, 2187 U.N.T.S 90 (hereinafter Rome Statute) (establishing victim participation in the investigation and prosecution of crimes in a neutral court); *see also* Salvatore Zappala, *The Rights of the Victims v. the Rights of the Accused*, 8 J. INT'L CRIM. JUST. 137, 142–43 (interpreting art. 75 of the ICC Statute as not requiring acknowledgment of rights of the accused during the reparations process).

93. *See Lubanga Dyilo,* Case No. ICC-01/04-01/06 OA 9 OA 10, ¶ 98 (explaining the victim's role in requesting submission of all evidence to the tribunal, which was in part the reason why the court allowed victims to offer evidence tending to prove the guilt of the accused); *see also* Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 263–65 (2007) (rejecting in part anonymous victim participation in evidentiary proceedings against Thomas Lubanga Dyilo).

94. *See* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and the Proceedings Before the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1445 (Antonio Cassese et al. eds., 2002) (noting that this is very similar to the "views and concerns" the victims are allowed to express); *see also* Menachem Elon, *Law, Truth and Peace: "Three Pillars of the World,"* 29 N.Y.U. J. INT'L L. & POL. 439, 446–47 (1997) (describing the judge's difficult task of evaluating the human behavior and responses presented from the perspectives of each party to determine the ultimate truth).

95. *See, e.g.*, James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principals and Politics*, 44 STAN. L. REV. 1301, 1342–43 (1992) (demonstrating the opportunities to prejudice the defendant when the prosecutor produces excessive amounts of evidence); *see, e.g.*, Sarah N. Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 20 ARIZ. L. REV. 85, 90 (1988) (describing the potential prejudices against the defendant when the victim produces information for trial).

96. *See Katanga*, Case No. ICC-01/04-01/07, ¶ 29 (embracing a criminal system where the procedural rights granted to a victim are limited in pursuance of a fair trial); s*ee, e.g.*, Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58–59 (1991) (noting that the appearance of unlimited power that prosecutors have on behalf of victims in adversarial proceedings risks prejudicing defendants).

The role of juries and judges may also make a difference as to what kind of victim participation would be allowable.[97]

Full participation as an auxiliary prosecutor, while potentially proper in pure inquisitorial systems, would not be proper in a mixed system with accusatorial features.[98] This is because assistance to the prosecution in accusatorial systems could tip the balance against the defendant in violation of the principle of "equality of arms."[99] In sum, full participation is only proper in pure inquisitorial systems.

Part Three: The ECCC

Victims enjoy a large number of rights and procedural opportunities to participate before the ECCC.[100] To understand if this broad participatory regime is proper in light of international fair trial standards,[101] it will be necessary to see how ECCC procedure fits into the regimes described above.

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97. *See* Orie, *supra* note 94, at 1445 (citing the proposition from the Feb. 8, 1996, Murray v. UK judgment of the ECHR that the role of juries, not just judging guilt but also participating in the sentencing process, may affect the fairness at trial); *see also* Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of the Victim Impact Statements to Safeguard Capital Sentencing Hearings From Passion and Prejudice*, 25 FORDHAM URB. L. J. 601, 608–09 (1998) (explaining the need for victim participation in jury trials to humanize the uniqueness of each victim).

98. *See, e.g.*, Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 239 (2008) (emphasizing the impropriety of victim participation in an accusatorial system like the adversary system); Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination Into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 100 (2009) (focusing on the breach of balance in accusatorial criminal systems when victims play a dominant role in the defendant's punishment).

99. *See* Craig M. Bradley, *The Convergence of the Continental and Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 473 (1996) (reviewing PHIL FENNELL ET AL., CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (1995)) (concluding that the prosecution has access to more resources and help, consisting of a police investigation and a prosecution team, than the defense); *see also* Fredric Megret, *Beyond "Fairness": Understanding the Detriments of International Criminal Procedure*, 14 UCLA J. INT'L L. & FOREIGN AFF. 37, 73 (2009) (recognizing that adversarial judicial systems oftentimes benefit the prosecution).

100. *See, e.g.*, James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers of the Court of Cambodia*, 31 U. HAW. L. REV. 507, 523–24 (2009) (asserting that victims who qualify as civil parties receive the benefit to a right to counsel during interviews with co-investigating judges); *see, e.g.*, Kate Yesberg, *Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal*, 40 VICTORIA U. WELLINGTON L. REV. 555, 568 (2009) (listing the procedural rights of civil party victims to include calling witness, making applications to the court, appealing decisions, and giving opening and closing statements in the ECCC).

101. It should be noted that the ECCC itself has already held that its regime, at least in regard to victim participation in pre-trial detention orders, is valid under international standards. *See* Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), ¶ 40 (holding its regime, at least in regard to victim participation in pre-trial detention orders, is valid under international standards); *see also* Ana D. Bostan, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, 12 CARDOZO J. INT'L & COMP. L. 1, 1–2 (2004) (defining a fair trial as a civil right that includes impartial and independent courts, a presumption of innocence and pretrial guarantees).

Adversarial, Inquisitorial or Mixed?

Rule 21(1)(a) of the Internal Rules of the ECC (Internal Rules) states that "ECCC proceedings shall be fair and adversarial."[102] A closer look at the Rules and the jurisprudence of the ECCC indicates that this blunt statement is not entirely accurate as a descriptive matter.[103] Most of the structures and the methods of investigation of the ECCC show a reliance on the French inquisitorial model of criminal procedure.[104] For example, the co-investigating judges conduct the investigation at the request of the prosecution,[105] and they also hold an "adversarial hearing" to decide on the provisional detention of the accused.[106] Confusing matters is the fact that after the "adversarial hearing," where the victims are not represented,[107] the appeal of detention is held before the Pre-Trial Chamber with the participation of victims who may raise new issues not heard at the "adversarial hearing."[108] Unfortunately, in one case the Pre-Trial Chamber made its decision on victim participation uncritically in reliance on the "authoriza-

102. *See* Internal Rules of the ECCC, (Rev. 6), 23(1)(a) (Sept. 17, 2010) (mandating that the ECCC proceedings are to be adversarial and fair between the parties).

103. *See* Yesberg, *supra* note 100 at 576 (acknowledging that victim participation in criminal tribunals may put the accused at a disadvantage during criminal procedures); *see also* Christopher Dearing, *An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia*, SEARCHING FOR THE TRUTH, Jan. 2009, at 1 (explaining the negative effect that rampant corruption in the ECCC has on Cambodia's legal system).

104. *See* Brianne McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. INT'L L. 127, 136 (2009) (explicating how the structure of the ECCC is similar to that of the French model); *see also* Cedric Ryngaert, *The Cambodian Pre-trial Chamber's Decisions in the Case Against Nuon Chea on Victim's Participation and Bias: A Commentary*, THE HAGUE JUSTICE PORTAL, Apr. 18, 2008, at 3 (expounding how victim participation in ECCC proceedings is taken directly from French criminal procedure).

105. *See* Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 6), 49, 53, 55 (Sept. 17, 2010) (hereinafter Internal Rules of the ECCC) (elucidating that prosecutions begin at the discretion of the prosecutors, then case files are transferred to the co-investigating judges, and the co-investigating judges play an important role in investigating cases).

106. *See* Internal Rules of the ECCC, *supra* note 105, 63(1) (explaining that an adversarial hearing comes before provisional detention); *see also Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), ¶13 (discussing the requirement of an adversarial hearing before determining provisional detention). The same also occurs in the French criminal justice system. *See also* 9150 Code de Procédure Penalé (C. PR. PÉN.) art. 145 (Sept. 9, 2002) (Fr.) (showing that detention determinations come after an adversarial hearing in the French Criminal Justice System). However, it is not the investigating judge who conducts the hearing but a liberty and custody judge.

107. *See* Press Release, Extraordinary Chambers in the Courts of Cambodia, ECCC Rules Committee Releases Draft Internal Rules (Nov. 3, 2006) (inviting constructive feedback in order to better draft the Internal Rules), *available at* http://www.eccc.gov.kh; *see also* Jenia Iontcheva Turner, *International Decisions: Decision on Civil Party Participation in Provisional Detention Appeals: Extraordinary Chambers in the Courts of Cambodia*, 103 AM. J. INT'L L. 116, 118 (2009) (discussing different arguments both in favor of and against allowing victims to represent their interests at hearings).

108. *See Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ¶ 42 (articulating the effect of victim participation in appeals against provisional detention orders but not initial adversarial hearings); *see also* Case C-312/93, Peterbroeck, Van Campenhout & Cie SCS v. Belgian State, 1995 ECR I-4599 (May 04, 1994) (discussing the general principle that prevents parties from raising new issues on appeal, which would normally preclude victims from raising new issues on appeal).

tion" of victim participation even while acknowledging that doing so may "cause an imbalance in the procedures and the right to a fair trial."[109]

Regarding the use of evidence, the ECCC does not directly use the dossier[110] but only the information in the dossier that has been introduced at the substantive hearing as evidence and subject to examination.[111] If the dossier were not to be understood as evidence,[112] this procedure would seem to be more in the traditional common law vein as only allowing that evidence

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109. *See Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ¶ 42 (deciding that the ECCC had authorized victim participation at the appeal stage of the trial). This is also an interesting decision in that article 33 (new) of the law establishing the ECCC requires that all decisions be made "in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights." Imbalance in contravention of the principle of "equality of arms" would seem to violate article 33 (new). *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 33 (2004) (setting forth trial proceedings and stating the intent to observe international standards of justice).

110. The case file as prepared by the co-investigating judges and the Pre-trial Chamber is transferred to the Trial Chamber before the start of the substantive hearing. *See* Internal Rules of the ECCC, *supra* note 105, 69 (describing the process for forwarding a case file to the Trial Chamber in order to set a trial date).

111. *See* Internal Rules of the ECCC, *supra* note 105, 87(2) (stating that the Chamber can base its decision only on evidence that has been put before the Chamber and subjected to examination). This is consistent with other Civil Law tradition penal codes. *See* C.P.P. art. 526(1) (establishing that the court can use only evidence acquired in the trial in determining their verdict); *see also* Strafprozeßordnung (StPO) (Code of Criminal Procedure) Feb. 1, 1877, Reichsgesetzblatt (RGBI) 253, as amended, § 261 (F.R.G.) (instructing the court to decide on the result of evidence based on the hearing as a whole); *see also* Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. J. INT'L HUM. RTS. 165, 170 (2010) (explaining how although evidence may be part of the case file to be used by the Trial Chamber in its judgment, the evidence must be put before the Chamber and subjected to examination).

112. *See* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and the Proceedings Before the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1439, 1451 (Antonio Cassese et al. eds., 2002) (explaining how professionals of a civil law background would consider contents of a dossier evidence); s*ee also* Görian Sluiter, *Due Process and the Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 314, 324 (2006) (showing how the Cambodian law is ambiguous as to whether the dossier is to be viewed as evidence).

which is adduced at trial.[113] The truth is that simple reference to information contained in the dossier is enough to allow the substance of that information to be used as evidence in deciding the guilt of the accused.[114] There is also the issue of opening statements.[115] The Rules of the ECCC allow for opening statements, a decidedly adversarial feature hinting at a "two-case approach" to the hearing.[116] The actual procedure for the production of evidence at trial is more reminiscent of the "one-case approach" of the civil law tradition.[117]

The fact that, as a whole, the procedure before the ECCC is heavily based on the French inquisitorial model has already been noted by at least one commentator.[118] Many of the issue listed above also exist in the Code de Procedure of the French Republic (Code de Proce-

113. *See* Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Decision on Defence Motion for Leave to Call Rejoinder Witness, ¶ 4 (Apr. 30, 2002) (discussing how the common law system requires the prosecution to introduce all evidence it intends to rely on); *see also* Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243, 254 (demonstrating the reason why the common law system allowance of evidence may be stricter due to the dossier not being considered evidence).

114. *See* Internal Rules of the ECCC, *supra* note 105, 87(3) (declaring that evidence can be used in a decision if its contents have been summarized, read out, or appropriately identified in court); *see also* The Asian International Justice Initiative, *Prosecutor v. Kaing Guek Eav, Alias "Duch,"* THE KRT TRIAL MONITOR, May 2009, at 5 (announcing that a report and document listed in an annex was enough to satisfy the "put before" requirement in rule 87(3)).

115. Opening statements are not envisioned by the German Code of Criminal Procedure, the Italian Code of Criminal Procedure, or the French Code of Criminal Procedure. *See generally* C.P.P. (lacking a requirement for opening statements); Strafprozeßordnung (StPO) (Code of Criminal Procedure) Feb. 1, 1877, Reichsgesetzblatt (RGBI) 253, as amended (failing to require opening statements); C. PR. PÉN. (lacking any mention of opening statements).

116. *See* Orie, *supra* note 112, at 1449 (noting the dichotomy between a one-case system and a two-case system and the common law approach against the civil law approach); *see also* Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 15 (2003) (discussing how a two-case approach makes disclosure by both parties necessary to ensure equal amounts of information). It should be noted here that victims are not entitled to make an opening statement pursuant to Internal Rule 89, further bolstering the idea that there are some adversarial aspects to the ECCC procedure. *See generally* Prosecutor v. Kaing, Case No. 001/18-07-2007-ECCC/TC, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make and Opening Statement During the Substantive Hearing, Trial Chamber (Mar. 27, 2009) (explaining that there are no opening statements even by a party to the proceedings, because they are limited to assisting the prosecution). *Cf.* Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 6), 94 (Sept. 17, 2010) (hereinafter Internal Rules of the ECCC) (illustrating that inquisitorial systems allow all the parties, victims included, to make closing statements); *see also* C.P.P. art. 523(1) (granting the opportunity for closing statements). *But see* Strafprozeßordnung (StPO) (Code of Criminal Procedure) Feb. 1, 1877, Reichsgesetzblatt (RGBI) 253, as amended § 258 (failing to allow civil parties to make closing remarks).

117. *See* Internal Rules of the ECCC, *supra* note 116, 91 (allowing the Chambers to hear civil parties' witnesses and experts in whatever order it deems to be useful); *see also* Kate Gibson & Daniella Rudy, *A New Model of International Procedure?,* 7 J. INT'L CRIM. JUST. 1005, 1007 (2009) (discussing the procedure of evidence collection in international criminal courts).

118. *See also* Brianne N. McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. INT'L LAW 127, 139–40 (2009) (explicating that the procedure prior to the ECCC was modeled after the French system. *Compare* C. PR. PÉN. art. 1 (noting that criminal procedure must maintain a balance between the rights of the parties and guarantee separation between the prosecutors and the judges), *with* Internal Rules of the ECCC, *supra* note 116, 21(1)(a) (noting that ECCC proceedings must preserve a balance between the rights of parties by guaranteeing a separation of powers).

dure).[119] The question then becomes what makes them different and whether any of those differences makes a difference as regard to the defendant's right to "equality of arms," as the ECCC grants victims the highest level of participatory rights.

Differences Between the ECC and Inquisitorial Systems

The victim's role as a party acting in support of the prosecution is above and beyond what is provided for in the Code de Procedure.[120] The fact that victims are also advocates against the defense of guilt or innocence makes the theory that the "two sides" have "equality of arms" ever more fleeting.[121] The inclusion of opening statements also points to a different concept of what is really happening at the trial, as it implies that both those for conviction and those against conviction have to present "their case" instead of a singular truth finding exercise by the court.[122] The parties are doing more than just suggesting an interpretation of the evidence heard during the trial.[123]

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119. *See* C. PR. PÉN. art. 145 (providing for an adversarial hearing when deciding on pre-trial detention, just like Internal Rule 63); *see also* Internal Rules of the ECCC, *supra* note 116, 63 (showing the similarities between a French adversarial hearing on provisional detention to those found here in the Cambodian criminal system). *See generally* Prosecutor v. Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTCO1), Decision on Appeal Against Provisional Detention Order Pre-Trial Chamber, ¶¶ 4, 14–16, (Mar. 20, 2008) (comparing the legal issues in this decision to those occurring in the French criminal justice system).

120. *See* Sergey Vasiliev, *Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 635, 684 (Carsten Stahn & Goran Sluiter eds., 2009) (explaining that the victim's role in assisting the prosecution includes the ability to initiate or take over the proceedings which is not provided for under the ICC); *see also* Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 INT'L & COMP. L.Q. 781, 792 (2002) (listing the ways in which the victim may be involved in a criminal prosecution, not including supplemental prosecution or support abilities).

121. This last issue is important because the usual Parte Civile does not participate as regards the guilt or innocence of the accused but only as regards their right to compensation for the damage caused by the crime committed. *See* Geert-Jan Alexander Knoops & Robert R. Amsterdam, *The Duality of State Cooperation Within International and National Criminal Cases,* 30 FORDHAM INT'L L.J. 260, 268 (2007) (arguing whether current interpretations of "equality of arms" is valid given that recent experiences show the defense operating from a procedurally disadvantaged position); *see also* Vanderpuye, *supra* note 67, at 573 (observing a statement made by the ICC Pre-Trial Chamber that observed an impossibility in creating a situation of absolute "equality of arms" between the defense and prosecution).

122. *See* Orie, *supra* note 112, at 1445 (examining the differences in approach of opening statements in international criminal proceedings wherein the parties present their cases separately as opposed to the civil-law model where only one singular case is presented); *see also* Shaleen Brunsdale & Kara Karlson, *Updates From International and Internationalized Criminal Courts & Tribunals,* 16 HUM. RTS. BR. 40, 43 (2009) (discussing potential issues with opening statements such as in the *Lubanga* case where the defendant's counsel objected to the content of the prosecution's opening statements).

123. *See* RUTH MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 231–32 (Oxford Univ. Press 2010) (outlining the significant participation of both parties in ECCC proceedings, including presenting opening and closing statements, introducing witnesses and offering evidence); *see also* Orie, *supra* note 112, at 1444–45 (comparing parties' active role in the adversarial system to the passive role in the inquisitorial system).

Since the French and ECCC systems are not identical, a judgment that one is valid under HR does not mean that the other will also be valid.[124] Victims before the ECCC have a prosecutorial function.[125] The opening statements also frame proceedings as a conflict between a prosecution and a defense, a decidedly adversarial setup.[126] Extensive victim participation, in any form, becomes less and less appropriate the more "adversarial" the proceedings become.[127] Even if we were to assume that the form of supplementary prosecution that characterizes victim participation before the ECCC was valid,[128] in a pure inquisitorial system that assumption would not carry over to the ECCC because of its adversarial features.[129] Where the victims act as a second prosecutor in an adversarial system, the defendant's right to "equality of arms" is

124. This appears to be what the court did in *Nuon Chea*. *See Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), ¶¶ 30–34, 40 (finding that victim participation in pre-trial appeals of a criminal proceeding is consistent with international standards); *see also* McGonigle, *supra* note 118, at 141–42 (noting the court in *Nuon Chea* failed to look at the examples of the ICTY, ICTR and SCSL in making its determination about victim participation in appeals).

125. *See* Internal Rules of the ECCC, *supra* note 116, 23(1) (stating that a main purpose of victim participation in criminal proceedings is to support the prosecution); *see also* MACKENZIE ET AL., *supra* note 123, at 232–33 (pointing to the substantial role victims play in ECCC proceedings, including the power to cross-examine witnesses, file motions and briefs and submit relevant information during sentencing regarding the impact of the crime).

126. *See* Brianne McGonigle, *Apples and Oranges? Victim Participation Approaches at the ICC and ECCC*, *in* THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE 91, 93 (Cedric Ryngaert ed., 2009) (categorizing the provision for opening statements by the prosecution and defense as an adversarial aspect of ECCC proceedings); *see also* Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. U. J. INT'L HUM. RTS. 165, 174, n.97 (2010) (recognizing that ECCC Internal Rule 89, which permits opening statements from the prosecution and defense, was amended to preclude victims from providing statements).

127. *See Katanga*, Case No. ICC-01/04-01/07, ¶ 69 (stating that victim participation may not be consistent in an adversarial system); *see also* Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 29 (2010) (acknowledging that in the context of international tribunals, the rights of the defendant may be put at risk by victim participation).

128. *See* Vasiliev, *supra* note 120, at 684 (explaining systems where this type of victim involvement is utilized and how the victim is able to act as an auxiliary prosecutor by being permitted to: adduce evidence, be heard in court, question opposing witnesses, and contest admissibility of questions); *see also* Davidson, *supra* note 127, at 29 (describing the victim's participation in the international tribunal and how the ECCC allows victims to "participate in appeals of release decisions").

129. *See* Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 6), 21(1)(a) (Sept. 17, 2010) (hereinafter Internal Rules of the ECCC) (requiring that ECCC proceeding shall be fair and adversarial and shall preserve a balance between the rights of the parties); *see also* Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination Into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 104–5 (2009) (explaining the difference between the adversarial and the inquisitorial systems).

violated.[130] The ECCC has been "adversarialized," specifically by creating a contest between the prosecution and defense, as such victim participation should be decreased from its current level at the permissive extreme.[131] Adversarial procedures do not permit multiple accusers.[132]

Conclusion

IL establishes a right for victims to be heard at the trial of an accused for the crime of which he or she is a victim.[133] It also establishes a floating upper limit on the level of victim participation based on the type of truth-finding method the court uses.[134] While the civil law/inquisitorial model heavily influences the ECCC, it is not a carbon copy and does have some common law/accusatorial aspects. These aspects, few as they may be, make victim participation as a subsidiary prosecutor inappropriate, as to do so violates the defendant's right to "equality of arms." This is not to say that victims should not participate before the ECCC; only that their involvement should be limited so as to protect the image of impartiality of the tribunal and the defendant's rights.

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130. *See Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, ¶ 14 (Pikis, J., dissenting) (referring to the victim's performance as a second prosecutor, as a violation of the presumption of innocence without directly referring to "equality of arms"); *see also* Stefania Negri, *Equality of Arms: Guiding Light or Empty Shell?, in* INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 13, 13 (2007) (explaining that the purpose of "equality of arms" is to provide equal treatment to both parties during a trial).

131. *See Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 12, ¶¶ 6–7 (Pikis, J., dissenting) (objecting against the majority's position on expanding the roles of victims, stating that only the parties to the proceedings should have a right to be heard reading the legal procedures, and that holding otherwise would create an unfair trial, because victims have "no interest distinct from the public interest that the law should take its course"); *see also* William Pizzi, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 62 (1996) (claiming that increased victim participation in adversarial systems forces a defendant to answer to both a prosecutor's pressures and a victim's attorney's pressures).

132. *See Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 12, ¶¶ 5–7 (Pikis, J., dissenting) (noting that defendants should not face more than one accuser, because allowing victims to introduce evidence and question other witnesses shifts the burden away from the prosecutor and unduly prejudices the rights of the defense). *See generally* Kweku Vanderpuye, *Traditions in Conflict: The Internalization of Confrontation*, 43 CORNELL INT'L L.J. 513, 575 (2010) (asserting that an accused should not be compelled to defend against more than one accuser, because this would create an imbalance in the scales of burden of proof of the prosecutor).

133. *See* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, ¶ 6(b), U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985) ¶ 6(b) (outlining the need to allow victims' views and concerns to be presented and considered in "appropriate stages of the proceeding where their personal interests are affected").

134. *See* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings of the ICC*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1440, 1477–78 (Antonio Cassese et al. eds., 2002) (noting that the general prosecution-defense dichotomy preserved in international criminal law is "common-law oriented," as opposed to the modern trend of "civil-law oriented," and as a result, there is an increased desire to "search for the truth" and not leave crimes unpunished).

Glencore AG v. Bharat Aluminum Co. Ltd.

No. 10-5251, 2010 U.S. Dist. LEXIS 116051 (S.D.N.Y. November 1, 2010)

The Court held that it did not have personal or quasi in rem jurisdiction over Balco as an alter ego if it did not have personal or quasi in rem jurisdiction over its parents.

I. Holding

In *Glencore AG v. Bharat Aluminum Co. Ltd.*,[1] the U.S. District Court for the Southern District of New York held that plaintiff's action to confirm an arbitral award, to enter judgment on the confirmation, to hold defendants liable under an alter ego theory and for tortious interference, and to attach the defendant's property prior to judgment was dismissed for lack of subject matter jurisdiction, personal jurisdiction and quasi in rem jurisdiction, and for failure to state a claim upon which relief may be granted.[2] The court reasoned that although Glencore AG (Glencore) had established a prima facie case that Bharat Aluminum Company Limited (Balco) was Sterlite India and Vedanta's alter ego, Balco had presented evidence to undermine these allegations, and therefore it was premature to determine alter ego status conclusively.[3] In addition, even if Balco's alter ego status had been established conclusively, the court's jurisdiction over it would not have been established, because the court did not have personal jurisdiction or quasi in rem jurisdiction over Vedanta or Sterlite India.[4]

II. Facts and Procedural History

The plaintiff, Glencore, is a business entity incorporated in Switzerland, where both its office and principal place of business are located.[5] The defendant, Balco, is an Indian corporation organized in India and maintains its head office and principal place of business there. Balco's primary business is mining and refining bauxite to create alumina.[6] The government of India owns 49% of Balco and Sterlite India owns 51%.[7] The defendant, Sterlite India, is located and operates in India from its two offices and plants as a producer of copper.[8] Sterlite India is the principal subsidiary of Vedanta Resources (Vedanta), another defendant in the case. The defendant Vedanta is a London holding company organized under English law and is listed on the FTSE 100, which recognizes it as one of the highest capitalized companies listed on the London Stock Exchange.[9] Vedanta operates from India, Zambia and Australia, dealing

1. No. 10-5251, 2010 U.S. Dist. LEXIS 116051 (S.D.N.Y. Nov. 1, 2010).
2. *See id.* at *7–*8.
3. *See id.* at *33.
4. *See id.* at *33–*34.
5. *See id.* at *3.
6. *See id.*
7. *See Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *3.
8. *See id.* at *5.
9. *See id.* at *7.

primarily with metals and mining.[10] Vedanta owns 54% of Sterlite India, making it the parent of the defendant Balco.[11]

On September 11, 2008, Glencore and Balco entered into a contract in which Glencore agreed "to sell and deliver to Balco twenty-five thousand metric tons of alumina."[12] The contract stated that the aluminum was to depart "from a port in Australia to a port in India."[13] The agreement provided that Glencore was to choose the vessel for transporting the goods and was allowed to "substitute a vessel at any time subject to Balco's approval."[14] The contract also contained an arbitration provision "stating that any dispute [between the parties was to] be settled by arbitration in London, England."[15] On September 23, 2008, Glencore nominated a vessel and Balco accepted that vessel one day later.[16] "Glencore then nominated a substitute vessel [but] Balco" refused to accept, instead requesting "a reduced contract price due to the falling prices of aluminum."[17] Despite Glencore's and Balco's efforts to resolve the dispute, Balco and its executives told Glencore that they would not accept the vessel without a new contract price.[18] Following this impasse, Glencore terminated the contract and filed a suit for a breach of maritime contract against Balco in the U.S. District Court for the Southern District of New York on November 17, 2008.[19] The suit named only Balco as a defendant and was "dismissed because the contract was not a maritime contract."[20]

Adhering to the arbitration provision in the contract, Glencore commenced arbitration against Balco in London, England, and received an arbitral award of "$5,731,793 plus interest, for damages arising from freight-related losses on the sale of alumina, damages arising from demurrage, arbitration costs and legal costs."[21] Glencore made written demands on Balco for the arbitral award, but Balco did not pay the award or respond to Glencore's demands.[22] In the present action, Glencore requested the court to confirm the London arbitral award, to enter judgment against Balco, to hold Vedanta and Sterlite India liable under an alter ego theory and for tortious interference with Balco's maritime obligations, and to attach defendant's property prior to judgment.

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10. *See id.*
11. *See id.*
12. *Id.* at *8.
13. *Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *8.
14. *Id.*
15. *Id.*
16. *See id.*
17. *Id.*
18. *See id.* (noting that in addition to Balco's executives, Sterlite India and Vedanta's executives were also a present force in the decision not to accept the vessel without the lower contract price).
19. *See Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *10.
20. *Id.* at *11.
21. *Id.*
22. *See id.*

III. Analysis

A. Claims Against Vedanta and Sterlite India

The court relied on the Second Circuit precedent established in *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*,[23] when it stated that "[a]n arbitration award may not be enforced under an alter ego theory against the parent corporation of the party subject to the award."[24] Glencore's claims against Vedanta and Sterlite India rested on the assertion that Sterlite India was Balco's alter ego.[25] However, because Vedanta and Sterlite India were not parties to the arbitration proceeding, and considering the fact-finding required in order to determine whether Sterlite India was in fact Balco's alter ego, the court found Vedanta and Sterlite India were not proper parties to this action.[26] Furthermore, whether Sterlite India and Vedanta tortiously interfered with Balco's obligation under the contract was not relevant to the present case because the performance of that obligation fell "outside 'the four corners of the dispute as submitted.'"[27]

B. Lack of Personal Jurisdiction

1. Legal Standard

In order to determine whether Glencore had traditional personal jurisdiction over a party, the court looked to whether the forum state would exercise jurisdiction over the party and whether that exercise of jurisdiction would be consistent with federal due process.[28] A foreign corporation is subject to personal jurisdiction in New York if it is "doing business"[29] in the state; that is, "if it is 'engaged in such a continuous and systematic course' of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction."[30] This is a stringent standard that does not consider mere "collateral activity" sufficient; it is imperative that a corporation be able to meet this test, because a foreign corporation subject to a suit in New York "may be sued in New York on causes of action wholly unrelated to acts done in New York."[31]

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23. 312 F.2d 299, 301 (2d Cir. 1963).

24. *Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *20 (relying on Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, 312 F.2d 299, 301 (2d Cir. 1963)).

25. *See id.*

26. *See id.* at *21–22.

27. *Id.*

28. *See id.* at *14.

29. *Id.*

30. *Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *14 (quoting Aerotel Ltd v. Sprint Corp., 100 F. Supp. 2d 189, 191–92 (S.D.N.Y 2000)) ("The term 'doing business' is used in reference to foreign corporations to relate to the 'ordinary business' which the corporation was organized to do. . . . It is not the occasional contact or simple collateral activity which is included" (quoting Bryant v. Finnish Nat'l Airline, 22 A.D.2d 16, 20 (N.Y. App. Div. 1964)).

31. *Id.*

In order to determine whether the court has personal jurisdiction over a party vis-à-vis an alleged alter ego, the subsidiary must be acting as an agent for the party, or the parent's control must be so overwhelming that the "subsidiary is a mere department of the parent."[32]

2. Personal Jurisdiction Over Balco

Glencore failed to establish that the court has personal jurisdiction over Balco.[33] There was no showing that Balco operated in or had contacts with New York. The fact that Balco entered into a contract with a Florida corporation or that Balco was assigned a patent in the United States was insufficient to establish a prima facie case that this court could exercise personal jurisdiction over Balco.[34] Additionally, Balco contended that it did not have property in the state, it did not do business in the state, and it did not have any presence in the state.[35]

3. Personal Jurisdiction Over Balco as Sterlite India and/or Vedanta's Alter Ego

In order to obtain personal jurisdiction over Balco as an alter ego of Sterlite India or Vedanta, the court had to find that it had personal jurisdiction over the potential parents *and* determine that Balco was their alter ego.[36] First, Glencore was unable to establish that the court had personal jurisdiction over Sterlite India and Vedanta, because there was no showing that they were "doing business" in New York.[37] Although the court found that Vedanta in fact might have owned property in New York after making purchases on the New York Stock Exchange and maintaining a bank account in New York where these securities were held, this was only one of five factors and was not sufficient to confer jurisdiction.[38]

Glencore had provided sufficient evidence to make a prima facie showing that Balco was Vedanta's and Sterlite India's alter ego.[39] However, making this determination *conclusive* would have been premature and unnecessary; the finding that Balco was an alter ego was now irrelevant because of the lack of personal or quasi in rem jurisdiction over Vedanta or Sterlite India.[40]

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32. *Id.* at *17

> Determining whether an entity is a "mere department" requires a "fact specific inquiry into the realities of the actual relationship between the parent and subsidiary." In particular, a court must consider (1) common ownership, (2) financial dependency of the subsidiary on the parent corporation, (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (4) the degree of control over the marketing and operational policies exercised by the parent.

33. *See id.* at *22.

34. *See id.*

35. *See id.*

36. *See Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *23.

37. *See id.*

38. *See id.* at *25. The court states that Glencore was able to meet only the second factor out of the five traditional criteria that the court evaluates when deciding whether it may exercise personal jurisdiction over an entity.

39. *See id.* at *33.

40. *See id.*

C. Lack of Quasi in Rem Jurisdiction

1. Legal Standard

If the court was unable to establish personal jurisdiction over a party, quasi in rem jurisdiction still might have been established by using control over the parties' interest in property within the state and determining that the exercise of jurisdiction over this property would not offend Due Process.[41]

2. Quasi in Rem Jurisdiction Over Balco Based on the Presence of Vedanta or Sterlite India's Property in New York

In order to exercise quasi in rem jurisdiction over Balco based on the presence of Vedanta or Sterlite India's property in New York, the court would have had to (1) find that Balco was their alter ego; (2) identify specific property that Vedanta or Sterlite India had in New York; and (3) find that Vedanta and Sterlite India "have minimum contacts with New York [so] that exercising jurisdiction over Balco [would] not offend due process."[42] Even if Vedanta had property within the court's jurisdiction, the court could not have exercised quasi in rem jurisdiction, because to exercise this jurisdiction "would offend 'traditional notions of fair play and substantial justice.'"[43] Glencore asserted that Vedanta's ownership of securities on the New York Stock Exchange, held in a New York depository, and its use of a New York law firm "to issue debts and securities" were sufficient to establish minimum contacts.[44] However, Vedanta's contacts in New York were too minor to establish that Vedanta had "purposefully availed itself of the privileges of doing business in New York."[45]

IV. Conclusion

This case represents the federal court's stringent application of jurisdictional rules when there is a lack of forum-selection clauses in foreign contracts. It is evident that an interest exists in protecting defendants from being haled into a foreign court over a dispute that may be wholly irrelevant to the property or minimum contacts deemed sufficient to confer jurisdiction. Furthermore, this holding will result in several implications involving the international arbitration process. On appeal, it is possible that the Court of Appeals for the Second Circuit will reverse, opting for the more lenient application in confirming arbitral awards adhered to by the Court of Appeals for the Ninth Circuit in *Ahcom Ltd. v. Smeding.*[46] *In Ahcom*, the ninth circuit held that a creditor had standing to sue Hendrik Smeding and his wife for an arbitration award owed by their family corporation that had filed for bankruptcy.[47] Both *Glencore* and

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41. *See id.* at *19 (explaining that due process requirements will be met as long as there are sufficient minimum contacts, so as not to offend traditional notions of fair play and substantial justice).

42. *Glencore AG,* 2010 U.S. Dist. LEXIS 116051, at *35.

43. *Id.* at *36.

44. *Id.*

45. *Id.*

46. 623 F.3d 1248 (9th Cir. 2010).

47. *See id.*

Ahcom represent two vastly different standards for confirming arbitral awards. On appeal, the Court of Appeals will be faced with deciding whether the consistency of relying on Second Circuit precedent and the desire to protect defendants outweigh the flexibility granted in *Ahcom*.

Amanda Caputo

Export-Import Bank of the United States v. Hi-Films S.A. de C.V.

No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010)

The Court held as mandatory a seemingly permissive forum-selection clause listing various forums for adjudication.

I. Holding

In *Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V.*,[1] the U.S. District Court for the Southern District of New York denied a motion to dismiss for lack of personal jurisdiction, even though the individual defendant was assumed to reside in Mexico, because a valid and enforceable forum-selection clause established sufficient contacts for personal jurisdiction.[2] A jurisdictional analysis is unnecessary when a valid and enforceable forum-selection clause exists.[3] Additionally, the clause allowed the court to dismiss the forum non conveniens claim.[4] Finally, the court also denied the defendant's request to stay the action, despite travel expenses and difficulty getting to and from the forum state.[5]

II. Facts and Procedural History

Plaintiff, the United States' official export credit agency, Export-Import Bank of the United States (the Bank),[6] is incorporated in the United States. It brought several breach of contract claims against defendants Miguel Angel Peredo Luna, Adrian Peredo Luna, and Gabriela Peredo Luna (collectively, the Luna Brothers)[7]. Borrower, Hi-Films S.A. de C.V., "a company incorporated and existing under the laws of Mexico,"[8] executed several promissory notes with the Luna Brothers as personal guarantors. Hi-Films received money in three separate agreements with financial institutions: two with Sterling Bank (Sterling) and one with World-Business Capital, Inc. (WBC).[9] Ultimately, Hi-Films defaulted on every loan.[10]

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1. No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010).
2. *See id.* at *1.
3. *See id.* at *10. A valid and enforceable forum-selection clause is sufficient to confer personal jurisdiction over the defendants.
4. *See id.* at *3.
5. *See id.* at *10.
6. *See id.* at *2. The Bank "promotes domestic exports [for the U.S.] by providing financial support for sales to foreign purchasers." The Bank insures loans for purchases of U.S. goods and services by foreign borrowers.
7. *See id.* at *1.
8. *See id.* at *3.
9. *See id.* at *8–*9.
10. *See id.* at *7.

However, only defendant Miguel Angel Peredo Luna (Miguel Luna) had been served, because the Bank lacked current addresses for the remaining defendants.[11] Miguel Luna moved to dismiss for lack of personal jurisdiction and on forum non conveniens grounds.[12]

This action involves three agreements between the Luna Brothers as personal guarantors, Hi-Films as borrower, and Sterling as lender. The first is the "Eximbank Insured Medium Term Export Credit Facility," in which the Lunas agreed with lender Sterling Bank to obtain a $2,534,513 loan for plastic film-making equipment.[13] The second is the "Eximbank Insured Export Credit Facility," which was acquired to obtain a revolving line of credit for $2 million to purchase plastic film, resin and other products.[14] Finally, Hi-Films and the Luna Brothers executed a term credit agreement with WBC, as lender, to obtain a line of credit to finance the purchase of plastic extrusion equipment.[15] Each agreement involved promissory notes with the Luna Brothers as personal guarantors, Hi-Films as borrower, and Sterling and WBC as lenders. Hi-Films ultimately defaulted on every promissory note to Sterling or WBC.[16] Sterling demanded payment under the first and second agreements' promissory notes but did not receive any funds.[17] Sterling ultimately assigned the Bank title to the loans.[18] The Bank alleged that as of March 4, 2009, the Sterling notes had a balance of $2,770,238.65 and the WBC notes a balance of $2,762,810.30.[19]

The promissory notes contained "virtually identical" terms involving a forum-selection clause identifying the federal district courts in New York and the District of Columbia, along with the competent courts of Mexico City, Federal District, United Mexican States, or "the courts of the domicile of the Maker."[20] Additionally, the forum-selection clause included a waiver provision waiving "any other jurisdiction to which they might have a right."[21] Each personal guarantee provision executed by the Luna Brothers included a waiver of "all defenses of

11. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010) at *2.

12. *See id.* at *1.

13. *See id.* at *3.

14. *See id.* at *4–*5.

15. *See id.* at *5.

16. *See id.* at *7–*9.

17. *See id.* at *6.

18. *See id.* at *6–*8.

19. *See id.* at *8. The Bank asserted "that as of March 4, 2009, the total outstanding balance due . . . under the Sterling Promissory Notes [was] $2,770,238.65"; the WBC promissory note's outstanding balance was $2,762,810.30. On top of the already considerable interest, interest continued to accrue. In November 2005, Hi-Films defaulted on the Sept. 8, 2004, note with Sterling. On Mar. 8, 2006, Sterling filed a notice of claim and proof of loss with the Bank where Sterling assigned the Bank all rights and title and money due under the promissory notes executed in 2005, in case the Bank paid part of the loss Sterling incurred. Sterling did the same on Mar. 10, 2006, regarding the Sept. 8, 2004, note executed with Sterling. The Bank paid Sterling the principal due and subsequently demanded payment from Hi-Films and the Luna Brothers of the amount due under the Sept. 8, 2004, note.

20. *See id.* at *8.

21. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010).

the Maker and all defenses of a surety or guarantor."[22] The Bank sought to enforce guaranties of payment made by the Luna Brothers. Miguel Luna argued that he lived in Mexico, and the court, "[f]or purposes of this motion," assumed that he resided in Mexico.[23] By defaulting, Hi-Films implicated the Luna Brothers. Each forum selection clause submitted those affected to "the Federal District Court in New York, or Mexico City Courts, Federal District Courts, or United Mexican States Courts."[24] Further, each provision executed by the personal guarantors included a waiver clause, "waiving defenses of the Maker," and all defenses of a surety or guarantor.[25] These were standard form contracts, so the terms were not negotiated by the parties. Additionally, New York State law would apply to any action regarding enforcement of the promissory note terms brought in a U.S. court involving Hi-Films and the Personal Guarantors.[26]

III. Discussion

Miguel Luna made a Rule 12(b)(2)[27] motion to dismiss for lack of personal jurisdiction. He also asserted that the "action should be dismissed on forum non conveniens grounds."[28] The court denied this motion.[29] Alternatively, Miguel Luna argued that the action should be stayed.[30] The Bank further opposed the stay on the grounds that it would suffer prejudice, "and

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22. *See id.* at *9.

23. *See id.* at *3.

24. *See id.* at *8–*9. Each forum-selection clause stated,

> For any legal action or proceeding with respect to this Note, the Maker, the lender and any other signatories hereof expressly submit themselves to any Federal District Court of the United States of America in New York, or the District of Columbia, or to any competent court in Mexico City, Federal District, United Mexican States, or to the courts of the domicile of the Maker, at the election of the holder hereof, wherefore they waive expressly any other jurisdiction to which they might have a right, including, but not limited to, every jurisdiction by reason of their present or future domiciles or by reason of the place of payment of this Note.

25. *See id.* at *9. Each personal guarantee provision executed by the personal guarantors also stated, "To the maximum extent permitted by law, the undersigned also waives all defenses of the Maker and all defenses of a surety or guarantor to which it might be entitled by statute or otherwise."

26. *See id.* at *8.

27. *See* Fed. R. Civ. P. 12(b)(2): "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . lack of personal jurisdiction."

28. *See Export-Import Bank of the U.S.* at *10.

29. *See id.*

30. *See id.* at *10.

that Luna [had] not explained how he would be prejudiced in the absence of a stay."[31] The court agreed and did not grant a stay.[32]

A. Miguel Luna's Motion to Dismiss for Lack of Personal Jurisdiction Is Denied Because the Agreement Contained a Valid and Enforceable Forum-Selection Clause

Forum-selection clauses are sufficient to confer personal jurisdiction as long as they are found valid and enforceable.[33] The plaintiff bears the burden of establishing personal jurisdiction over a defendant on a motion to dismiss pursuant to Rule 12(b)(2).[34] Further, if the agreement contains a valid and enforceable forum-selection clause, it is not necessary to analyze the matter under the New York long-arm statute.[35] Because parties can consent to personal jurisdiction through forum-selection clauses in contracts, Miguel Luna consented to jurisdiction in the Southern District of New York when he executed each promissory note.[36]

B. This Forum-Selection Clause Passes the Second Circuit's Four-Part Enforceability Test

The Second Circuit formulated a four-part analysis to determine the enforceability of a forum-selection clause:

1. The clause must be "reasonably communicated to the party resisting enforcement";
2. The clause must be classified as either "mandatory or permissive";
3. The clause must involve the claims and parties involved in the suit;
4. The resisting party must not have "rebutted the presumption of enforceability by making a sufficiently strong showing that 'enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.'"[37]

Enforceability of forum-selection and choice-of-law clauses is presumed because, as illustrated in *M/S Bremen v. Zapata Off-Shore Co.*,[38] such clauses remove ambiguity. This *Bremen* standard has been applied to contractual disputes between domestic parties in non-admiralty contexts as well.[39] Specifically, the clause is presumptively enforceable if it (1) has been communicated to the resisting party; (2) has mandatory force; and (3) covers the claims and parties

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31. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010) at 10.
32. *See id.* at *36.
33. *See id.* at *12. *See also* D.H. Blair & Co. v. Gottdiener, 462 F.2d 95, 103 (2d Cir. 2006) (citing Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 315–16 (1964).
34. *Id.* at *10–11.
35. *See id.* at *11.
36. *See id.* at *12–*13.
37. *See id.* at *13 (quoting Phillips v. Audio Active, 494 F.3d 378, 383–84 (2d Cir. 2007)).
38. 407 U.S. 1 (1972).
39. *See id.* at *13 (citing Aguas Lenders Recovery Grp. v. Suez, 585 F.3d 696, 700 (2d Cir. 2009)).

involved.[40] New York courts can apply general contract law and federal precedent when the forum-selection clause includes a choice-of-law provision.[41]

First, the court determined that the forum-selection clause was reasonably communicated to Miguel Luna; it was plainly printed in both English and Spanish, as well as in separate, setoff paragraphs spanning several agreements.[42] Miguel Luna argued that because he did not get to negotiate the precise terms of the agreement, it was not clearly communicated.[43] But the court held that form contracts, for policy reasons, are acceptable and not considered to be illegal adhesion contracts.[44] Even in "fine print" cases, when the clause is not hidden, it is considered sufficiently communicated.[45]

Second, the forum-selection clause in this case was classified as mandatory: the parties were required to bring suit in the specified forum, "exclusive of all others,"[46] as opposed to a permissible clause, allowing suit in a variety of forums.[47] The court disagreed with Miguel Luna's argument that the clause was permissive, because three other forums in the clause were listed.[48] Because Miguel Luna waived "all defenses of the Maker and all defenses of a surety or Guarantor"[49] and agreed to jurisdiction "at the election of the holder,"[50] the forum-selection clause was functionally mandatory.[51]

Third, because the parties and claims were subject to the clause, this third element was not in dispute.[52]

Fourth, Miguel Luna did not rebut the presumption of enforceability.

A party may overcome the presumption of enforceability by making a "sufficiently strong showing [of the unenforceability]" because: (1) "its incorporation was a result of fraud or overreach[ ]"; (2) "the law . . . applied in the [chosen] forum is fundamentally unfair"; (3) "enforcement [would be contrary to] a strong public policy of the forum state"; or (4) "trial in the

40. *Id.* at *13.

41. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010) at *14 (citing TradeComet.com v. Google, 693 F. Supp. 2d 370, 676–77 (S.D.N.Y. 2010) (citing *Phillips*, 494 F.2d at 384)).

42. *See id.* at *16.

43. *See id.*

44. *See id.* at *17; Effron v. Sun Line Cruises, 67 F.3d 7, 10–11 (2d Cir. 1995).

45. *See id.* (citing *Effron*, 67 F.3d at 10–11 (2d Cir. 1995)).

46. *Id.* at *17–*18 (quoting Aguas Lenders Recovery Grp. v. Suez, 585 F.2d 696, 700 (2d Cir. 2009).

47. *See id.* at *18.

48. *See id.* at *21

49. See *id.* at *20.

50. *See id.*

51. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010) at *21.

52. *See id.* at *23–*24.

forum selected will be so difficult and inconvenient that the plaintiff [will in effect] be deprived of his day in court."[53]

Miguel Luna argued all except the second basis.[54]

First, the court rejected Miguel Luna's argument that he was deprived of an opportunity to negotiate, holding that this did not amount to fraud or overreaching.[55] Second, Miguel Luna argued that his residence in Mexico coupled with serious financial problems deprived him of his day in court and made the trial difficult and inconvenient.[56] This was denied by the court as insufficient to rebut the presumption of enforceability. The court added that cost and difficulties associated with litigating in a foreign forum were similarly insufficient.[57] Miguel Luna's final allegation, that traveling to and from the United States was difficult, given immigration laws in the United States, was rejected on account of Miguel Luna's E-2 visa, which authorized him to enter the United States. The court held that these circumstances did not render Miguel Luna's Mexican citizenship problematic.[58] Further, the court emphasized that a litigant may participate in judicial proceedings through modern conveniences, such as electronic filing and video conferencing.[59]

In his reply brief, Miguel Luna added for the first time that he had initiated "quasi-bankruptcy" proceedings in Mexico, in which the Bank had been named as a creditor.[60] Since "new arguments may not be made in a reply brief,"[61] the court dismissed this comity argument, despite the possibility of multiple and inconsistent outcomes in the parallel proceedings.[62] The court rejected this as a basis for enforcement of the forum-selection clause as contravening a strong public policy.[63] The Supreme Court, as the court noted, has held that forum-selection clauses should be enforced unless exceptional circumstances exist.[64]

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53. *See id.* at *25.

54. *See id.* at *24–*25.

55. *See id.* at *25.

56. *See id.* at *26.

57. *See id.* at *27.

58. *See id.*

59. *See id.* at *28–32 (citing Calix-Chacon v. Global Int'l Marine, 493 F.3d 507, 515 (5th Cir. 2007); *see* also Effron v. Sun Line Cruises, 67 F.3d 7, 10–11 (2d Cir. 1995)).

60. *See Export-Import Bank of U.S.*, 2010 U.S. Dist. LEXIS 100927 at *32–*36.

61. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010) at *35 (citing Ernst Haas Studio v. Palm Press, 164 F.3d 110, 112 (2d Cir. 1999)).

62. *See id.* at *35.

63. *See id.* at *32–*33.

64. *See id.* at *35.

C. Miguel Luna's Motion to Dismiss on Forum Non Conveniens Grounds Is Denied

Because Miguel Luna's foreign selection clause was mandatory and otherwise enforceable, the court did not have to proceed with the forum non conveniens analysis.[65]

D. Miguel Luna's Request for a Stay Is Denied

Alternatively, Miguel Luna asked that the court stay the action "until all necessary parties have been served."[66]

A stay may be issued by a district court by balancing five competing factors:

1. the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed;
2. the private interests of and burden on the defendants;
3. the interests of the courts;
4. the interests of persons not parties to the civil litigation; and
5. the public interest.[67]

The court determined that this situation did not warrant a stay, because Miguel Luna did not demonstrate that moving forward would unfairly prejudice him, nor did he cite any competing authority indicating that all foreign defendants had to be served.[68] Further, the court emphasized that the Bank would be prejudiced if a stay were issued because it would delay the Bank's right to pursue recovery on the notes.[69] Even though Miguel Luna emphasized that judicial resources would not be wasted, given that the other defendants would make similar arguments, this was outweighed by the "plaintiff's strong interest in proceeding with its litigation."[70] Miguel Luna did not demonstrate unfair prejudice but, rather, argued a lack of financial resources to litigate in New York and in Mexico.[71]

IV. Conclusion

Both the motion to dismiss for lack of personal jurisdiction and, alternatively, a stay of proceedings were denied.

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65. *See id.* at *35–*36.
66. *See id.* at *36.
67. *See id.* at *36–*39 (citing Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Lafarge N. Am. Inc., 474 F.Supp 2d 474, 482 (S.D.N.Y 2007)).
68. *See id.* at *38.
69. *See id.* at *39.
70. *See id.* at *38.
71. *See* Export-Import Bank of the U.S. v. Hi-Films S.A. de C.V., No. 09 Civ. 3573, 2010 U.S. Dist. LEXIS 100927 (S.D.N.Y. Sept. 24, 2010) at *38.

An appellate court may find error and reverse on the basis that the Bank was not aware of the addresses of the other Luna Brothers. Presumably, after insuring what amounted to millions of dollars, the Bank would have the necessary information on the personal guarantors to effectuate an accurate and complete service. The court relegated this omission to a footnote.

Additionally, district courts generally have discretion to authorize a stay. Even though the court's cited authority established that access to air travel makes the forum more "convenient," Miguel Luna's parallel proceedings with the same bank and other travel burdens might have warranted at least a brief stay.[72] Thus, an appellate court may reject the reasoning that Miguel Luna's mere possession of a visa vitiates travel difficulty. Specifically, the aggregate effect of the several challenges may together warrant a stay. The court cited cases involving videoconferencing and "e-filing" as examples of why Miguel Luna would not be deprived of his "day in court."[73] Yet no evidence indicates that either method is relevant or could be used in this action; these propositions may be inapplicable here. An appellate court may also reject the application of *M/S Bremen* and find the cases the court used as support to be factually distinguishable. For example, Miguel Luna may argue that the court improperly balanced his personal financial difficulties and erroneously relied on case law involving a small company instead of an individual to justify the insufficiency of financial distress to break a mandatory forum-selection clause.[74] Although no appeal has yet been filed, this case has been cited as authority to decide whether personal jurisdiction over nonresident defendants exists.[75]

Robert Byrn

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72. *See id.* at *28 (citing Effron v. Sun Line Cruises, 67 F.3d 7, 10–11 (2d Cir. 1995).

73. *See* Universal Grading Serv., v. E-bay, 2009 U.S. Dist. LEXIS 49841, at *67–*68.

74. *See Export-Import Bank of U.S.* at *38 (citing Mercury West A.G. Inc. v. R.J. Reynolds Tobacco, 2001 U.S. Dist. LEXIS 3508).

75. *See* Global Gospel Music Group v. Habukkuk Music, U.S. Dist. WEST No. 10 CIV 01818(GBD), 2010 WL 4968172, at *2 (2d Cir. 2004).

In re Vitamin C Antitrust Litigation

MD 06-1738, 2011 U.S. Dist. LEXIS 5466 (E.D.N.Y. Jan. 20, 2011)

The court held that only one of nine of defendant's documents requested was protected because defendant, a pharmaceutical company in the People's Republic of China (PRC), shared the documents with non-party government entities of the PRC.

I. Holding

In *In re Vitamin C Antitrust Litigation*,[1] the U.S. District Court for the Eastern District of New York held that defendant, Northeast Pharmaceutical Group Co., Ltd. (NEPG), must produce eight of the nine documents, granting in part and denying in part the plaintiffs' motion to compel. The plaintiffs were Animal Science Products, Inc., The Ranis Company, Inc., and Magno-Humphries Laboratories, Inc. (collectively ARM). The court reasoned that the attorney work-product doctrine did not protect the eight documents from discovery, either because the document was not prepared in anticipation of litigation, so that the privilege was never established, or because the privilege was waived when ARM voluntarily disclosed the document to a non-party entity. The court found that the privilege applied to only one of the plaintiffs' documents, because a joint-defense agreement protected it from disclosure to an adversarial party.

II. Facts and Procedural History

This suit stems from an action brought by plaintiffs on June 7, 2006,[2] claiming that four Chinese pharmaceutical companies that manufactured and sold vitamin C to the United States, including NEPG, violated § 1 of the Sherman Act,[3] and §§ 4 and 16 of the Clayton Act[4] by fixing prices and deliberately limiting the amount of vitamin C exported.[5] Defendants did not deny these allegations but claimed that the court should grant their motion to dismiss because they were compelled by the Chinese government to engage in these practices.[6] Although the court did not deny that government coercion could be grounds to dismiss the case, it found that the evidence here was "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," and, thus, denied defendants' motion to dismiss.[7]

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1. MD 06-1738, 2011 U.S. Dist. LEXIS 5466 (E.D.N.Y. Jan. 20, 2011).
2. *See* In re Vitamin C Antitrust Litigation, MDL 06-1738, 2006 U.S. Dist. LEXIS 73064 (E.D.N.Y. June 7, 2006).
3. 15 U.S.C. § 1 (2010).
4. 15 U.S.C. §§ 4, 16 (2010).
5. 06-MDL-1738, 2008 U.S. Dist. LEXIS 90442, at *547-48 (E.D.N.Y. Nov. 6, 2008).
6. *See id.* at *548. The defendants raised the defenses of foreign sovereign compulsion, act of state, and international comity, claiming that the actions of a foreign government should be protected from scrutiny. *See id.* at *550.
7. *See id.* at *557-*59.

On August 21, 2008, plaintiffs filed a motion to compel NEPG to disclose nine documents that it withheld from discovery.[8] The court heard oral arguments[9] and found that although there were nine documents at issue, most were duplicates or variations of three original documents: "the Ministry Report,"[10] "the Report to Government Agencies,"[11] and "Document 17."[12] The Ministry Report "was written by the Commerce Ministry . . . to 'The Chamber,' and shared with NEPG."[13] The Report to Government Agencies was written by NEPG and "sent [ ] to the Commerce Ministry, . . . PRC's Ministry of Foreign Affairs, and the Shenyang Municipal Bureau of Foreign Trade and Economic Cooperation."[14] Document 17 was also written by NEPG but shared with only the Commerce Ministry.[15]

NEPG claimed that the documents were all protected by the attorney-client and work-product doctrines pursuant to Federal Rules of Civil Procedure 26(b)(3).[16] NEPG also claimed that the documents were independently protected by the "common interest doctrine,"[17] based on a joint-defense agreement with a non-party. ARM argued that the privilege did not apply to any of the nine documents, because NEPG had waived the privilege through disclosure to non-party entities.[18]

III. Discussion

A. Work-Product Doctrine

1. Applicable Law

The work-product doctrine prevents discovery of documents "prepared in anticipation of litigation or for trial by or for another party or its representative."[19] The purpose of the doc-

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8. *See* In re Vitamin C Antitrust Litigation, 2011 U.S. Dist. LEXIS 5466, at *6 (E.D.N.Y. Jan. 20, 2011).

9. *See id.* at *7 (oral arguments were held on September 10, 2008).

10. *Id.* (The Ministry Report consists of "documents 3 and 4 [and] are two English translations of the same document").

11. *Id.* (The Report to Government Agencies consists of "documents 1, 6, 7, 8, 13, and 43 . . . which all have essentially the same content").

12. *Id.* at *8 (Document 17 refers to document 17 of the Privilege Log and does not have any duplicates). *See id.*

13. *Id.* at *7 (The Ministry Report was also sent to "the Commerce Ministry's outside counsel and the other defendants in this litigation").

14. *See* 2011 U.S. Dist. LEXIS 5466 at *7–*8.

15. *See id.* at *8.

16. "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." FED. R. CIV. P. 26(b)(3) (F.R.C.P.).

17. *See* 2011 U.S. Dist. LEXIS 5466, at *18–*19 (citing United States v. Agnello, 135 F. Supp. 2d 380, 382 (E.D.N.Y. 2001); Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999); ECDC Envtl., L.C. v. New York Marine & Gen. Ins. Co., 1998 U.S. Dist. LEXIS 8808, 1998 WL 614478, at *16–17).

18. *See id.* at *6.

19. *Id.* at *8 (quoting F.R.C.P. 26(b)(3)(A)).

trine is to "preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy . . . free from unnecessary intrusion by his adversaries."[20] However, the privilege is not indestructible.[21] When a party voluntarily discloses the privileged documents with a non-party entity, the privilege can be destroyed. In order to determine whether the privilege was waived, the court determines "whether the disclosure at issue has 'substantially increased the opportunities for potential adversaries to obtain the information.'"[22] The party claiming the work-product doctrine protects the documents from discovery "carries the heavy burden of demonstrating that the privilege applies and has not been waived."[23]

2. The Ministry Report

In determining whether the Ministry Report was protected by privilege, the court found that the document did not meet the threshold test, because it was not "prepared by or for a party, or by his representative."[24] NEPG claimed that the document was prepared to support them in the instant litigation; however, the Privilege Log[25] states otherwise. It "describe[d] the document as one prepared by the Commerce Ministry [for] the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the 'Chamber')."[26] The Commerce Ministry sent a copy of the document to NEPG, but the court emphasized that just because the Commerce Ministry sent the document to NEPG does not mean that it was prepared for NEPG.[27] Therefore, defendant did not meet its burden of proving the Ministry Report was protected by the attorney work-product doctrine.[28]

3. The Report to Government Agencies

NEPG prepared "The Report to Government Agencies" (the Report) but disclosed the document to the Commerce Ministry, the Foreign Ministry, and the Shenyang Bureau.[29] Typically, foreign government entities are subject to immunity from jurisdiction.[30] Courts may try to impose rules or decisions on foreign governments, but those rules or decisions are not neces-

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20. *Id.* at *8–*9 (quoting United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998)).

21. *See id.* at *9.

22. *Id.* (quoting In re Visa Check/Master Money Antitrust Litigation, 190 F.R.D. 309, 314 (E.D.N.Y. 2000)).

23. In re Vitamin C Antitrust Litigation, 2011 U.S. Dist. LEXIS 5466, at *9 (citing In re Grand Jury Subpoenas, 318 F.3d at 384; Bank of America, North America v. Terra Nova Insurance Co., 212 F.R.D. 166, 169 (S.D.N.Y. 2002)).

24. *Id.* at *9.

25. The Privilege Log was prepared by NEPG, listing documents that it withheld from discovery based on attorney-client, work-product, and "common interest" privileges. *See id.* at *7.

26. *Id.* at *11.

27. *See id.*

28. *See id.* at *12.

29. *See* 2011 U.S. Dist. LEXIS 5466, at *13.

30. "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C § 1604 (1976).

sarily binding on those governments.[31] Here, the court found that the Report met the threshold test, because it was prepared by NEPG for this litigation.[32] However, the privilege was broken when NEPG shared the document with the three non-party entities, regardless of whether the non-party entities were foreign government agencies.[33] The court stressed that NEPG increased the chances that ARM could have received the document.[34]

NEPG claimed it "share[d] a common interest"[35] with the government entities and that sharing the document with the PRC government did not increase an adversarial party's opportunity to see that document. However, the court refused to accept NEPG's assumption that the PRC government would act in NEPG's interests, finding that "such an assumption would be pure speculation," because "[a] nation's foreign policy apparatus inherently has many competing interests to balance."[36] In fact, the court went on to state that the PRC government might actually cooperate with the plaintiffs, in order to encourage foreign investments.[37]

NEPG also supported its claim that the Report is protected by privilege by citing an oral agreement that it made with the Commerce Ministry.[38] NEPG claimed that it ensured the confidentiality of the Report.[39] However, the court stated that the agreement was "nothing more than [a] hearsay report."[40] Furthermore, the court found that the oral understanding did not apply to the other two non-party entities to whom NEPG disclosed the Report.[41] Thus, NEPG did not meet its burden of showing the privilege was not waived with regard to the Report.[42]

4. Document 17

NEPG sent "Document 17," a letter including a detailed analysis of NEPG's legal position in this suit, to the PRC's Minister of Commerce.[43] NEPG and the Chamber, a division within the Commerce Ministry that also prepared the Ministry Report, entered into a "Joint Defense Agreement" to protect the confidentiality of Document 17.[44] Unlike the oral agree-

31. *See* Medellin v. Texas, 552 U.S. 491, 536 (2008) (finding that a decision by the International Court of Justice is not enforceable in domestic courts, nor is a treaty automatically binding as domestic law even if the United States signs the treaty).

32. *See* 2011 U.S. Dist. LEXIS 5466, at *12.

33. See id.

34. *See id.* at *13.

35. *Id.* at *14.

36. *Id.* at *15.

37. *See id.*

38. *See* 2011 U.S. Dist. LEXIS 5466, at *n.2.

39. *See id.*

40. *Id.*

41. *See id.*

42. *See id.* at *16–*17.

43. *See id.* at *17.

44. *See* In re Vitamin C Antitrust Litigation, 2011 U.S. Dist. LEXIS 5466, at *17.

ment that NEPG made with the Commerce Ministry with regard to the Report,[45] the court found that the joint-defense agreement here limited the opportunity for ARM to receive Document 17.[46] Furthermore, the disclosure furthered the common interests of NEPG, as well as those of the Chamber.[47] Their "common interests," along with the joint-defense agreement, were sufficient to protect Document 17 from discovery.[48]

B. Common Interest Doctrine

NEPG also claimed that the "common interest" doctrine, which is an exception to the waiver of the attorney work-product doctrine, protected the documents in dispute.[49] The purpose of the doctrine is to shield documents from one party to another party when there is a joint-defense agreement in place.[50] Here, the court listed several reasons why NEPG failed to meet its burden of proving the exception applies.[51]

First, the court found that the NEPG's oral joint-defense agreement with the Commerce Ministry was insufficient.[52] The defendant failed to show that

> (1) . . . legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[53]

Second, NEPG and the non-party government entities did not share a common legal interest.[54] Although the government agencies might have had an interest in NEPG doing well in the instant litigation, the court emphasized that there were no legal consequences for any of the agencies.[55] Therefore, the "common interest" doctrine did not protect the Ministry Report or the Report to Government Agencies.[56]

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45. *See id.* at *16.
46. *See id.* at *17.
47. *See id.* at *18.
48. *See id.*
49. *See id.* at *18–*19.
50. *See* In re Vitamin C Antitrust Litigation, 2011 U.S. Dist. LEXIS 5466, at *19 (citing United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)).
51. *See id.* at *19.
52. *See id.*
53. *Id.* at *19–*20 (citing United States v. International Brotherhood of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997)).
54. *See id.* at *20.
55. *See id.* at *20–*21.
56. *See* In re Vitamin C Antitrust Litigation, 2011 U.S. Dist. LEXIS 5466, at *23.

III. Conclusion

The United States District Court for the Eastern District of New York granted in part and denied in part plaintiff's motion to compel defendant to produce nine documents that defendant claimed were protected by attorney work-product doctrine. The court refused to extend the privilege to eight of the documents because two were not prepared in anticipation of litigation, and the remaining six were voluntarily disclosed to non-party entities, thus increasing the risk that an adversarial party could have obtained the documents. The court also denied NEPG's claim that the joint-defense agreement protected the documents from discovery, because the defendant and the entities the NEPG disclosed the documents to did not share the same legal interests.

Finally, the court agreed with NEPG that Document 17 was protected by privilege because the joint-defense agreement limited the risk that the ARM could have obtained the document. Therefore, the NEPG would not be compelled to produce Document 17. NEPG might appeal the District Court's decision. While it is likely to lose on its argument regarding the Ministry Report, because the document was not prepared for NEPG nor used to support NEPG's position, the appellate court could accept NEPG's claim that the Report to Government Agencies is protected by privilege and that privilege was not broken. The court claims that the risk of an adversary obtaining the document increased when the defendant disclosed the document to the PRC agencies. However, given the joint-defense agreement signed between one of the agencies and defendant, it is difficult to believe that the PRC agencies may have given the documents to plaintiffs. Even if the government of the PRC had an incentive to cooperate with ARM in an effort to encourage future foreign investments, it would be unlikely to do so because assisting local pharmaceutical companies would promote the PRC's economy. This objective is evidenced by the Ministry Report, which is a document the government of the PRC wrote in support of NEPG's case, as well as by the letter submitted by the Commerce Ministry in opposition to the motion. Thus, common interests limit the risk that ARM could have received the document, and those interests would then protect the Report to Government Agencies from discovery.

Stephenie Yeh

United States v. Miller

626 F.3d 682 (2d Cir. 2010)

The Court upheld the conviction of the defendant for international parental kidnapping, finding no abuse of discretion in the District Court's decision to exclude evidence of the defendant's pending appeal of a Vermont Family Court order that granted full custody to her ex-husband.

I. Holdings

In *United States v. Miller*,[1] the U.S. Court of Appeals for the Second Circuit affirmed the defendant's conviction of international parental kidnapping.[2] The court found that the government proved all elements of the international parental kidnapping statute. The government did so by demonstrating that the defendant's child had been in the United States, that the defendant prevented the child from returning to the United States from another country, and that the defendant acted with the intent to obstruct the exercise of her ex-husband's parental rights.[3] It ruled that the evidence presented was sufficient to support a finding against the defendant, in that she acted with intent to obstruct parental rights.[4] The Court held that the district court did not abuse its discretion in excluding evidence of the defendant's pending appeal to the Vermont family court.[5] The court reasoned that the pending appeal was not relevant[6] in the prosecution of international parental kidnapping pursuant to 18 U.S.C. § 1204(a).[7] The district court denied the defendant's motion for a continuance to await the outcome of the same appeal. In doing so, the appellate court ruled that the district court did not abuse its discretion by denial of this motion.[8]

II. Facts and Procedural History

Defendant, Michelle Miller, who has since reverted to her maiden name Michelle Favreau (Favreau), met Keith Miller (Miller) during high school in Vermont.[9] On March 3, 1994, they had one child together, Robert Keith Miller (Robbie).[10] Favreau and Miller were married there-

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1. 626 F.3d 682 (2d Cir. 2010).
2. *See id.* at 687.
3. *See id.* at 688.
4. *See id.* at 691.
5. *See id.*
6. *See id.*
7. 18 U.S.C.A. § 1204(a) states:

   > Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental right shall be fined under this title or imprisoned not more than 3 years, or both.

8. *See Miller,* 626 F.3d at 690.
9. *See id.* at 685.
10. *See id.*

after. In March 1999, the couple divorced.[11] Following their divorce, "Favreau was awarded legal custody of Robbie."[12] Miller was given some visitation rights.[13] On April 25, 2000, Favreau was granted "an *ex parte* temporary abuse prevention order from Probate and Family Court Department of the Massachusetts Trial Court,"[14] which allowed her temporary full custody of Robbie.[15] After an adversarial hearing, which both parties attended, the order was extended for a year.[16] Following his motion for reconsideration, Miller was allowed supervised visitation and a review, scheduled at the completion of six supervised visits.[17]

However, only one visit was conducted in accordance with the Massachusetts order.[18] Favreau then moved with her son to several locations, both intra-state and inter-state. She did not inform Miller of her whereabouts, because the frequent moves were made in an effort to stay away from him.[19] On May 23, 2010, Favreau moved Robbie to Canada. She did not notify Miller of this move and was aware that only one of the six court-ordered visits had been completed.[20]

Favreau applied for permanent resident status in Canada. After obtaining that status, she applied for custody of Robbie on September 11, 2002.[21] Also in 2002, Miller initiated "parallel court proceedings in the United States to try to regain custody status of Robbie."[22] The Massachusetts family court granted Miller's request to transfer the case to Vermont family court on the grounds that Favreau's whereabouts were currently unknown.[23] On September 13, 2002, Vermont family court issued full custody of Robbie to Miller pending "a further evidentiary hearing."[24] The court held Favreau in contempt of court, issuing a bench warrant for her arrest.[25] In 2005, the Superior Court of Quebec granted Favreau custody, dismissing Miller's motion for lack of jurisdiction on the grounds that its exercise of jurisdiction was in the best interest of the child. On appeal, the Canadian appellate court affirmed the Superior Court's holding.[26]

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11. *See id.*
12. *Id.*
13. *See id.*
14. *See Miller,* 626 F.3d at 685.
15. *See id.*
16. *See id.*
17. *See id.* at 685–86 (modifying the original order by permitting Miller to have two hours of supervised visitation per week for at least six visits).
18. *See id.* at 686 (following the order, the first supervised visit was held in accordance with the terms of the order).
19. *See id.*
20. *See Miller*, 626 F.3d at 686.
21. *See id.* (seeking custody of Robbie in addition to a cancellation of Miller's visitation rights and a request for child support).
22. *Id.*
23. *See id.*
24. See *id.*
25. *See id.*
26. *See Miller*, 626 F.3d at 686 (following Miller's appeal to the decision of the Canadian Superior Court, the Canadian appellate court affirmed the decision to award Favreau custody on February 3, 2005).

Favreau was indicted in the U.S. District Court for the District of Vermont for violation of 18 USC § 1204(a), Sec. 1204, international parental kidnapping, for the period of June 2002 through December 2002.[27]

Favreau was arrested by federal marshals upon her return to Vermont in January 2006 and transferred to the custody of the state pursuant to the contempt charge in Vermont.[28] She moved "to dismiss the charge on the ground that [the court] lacked subject matter jurisdiction" at the time of the 2002 order.[29] She requested that the court recognize the custody order granted by the Canadian court and grant relief from the judgment of contempt.[30] The Vermont state court denied all requests. These matters were appealed to the Vermont Supreme Court.[31]

Favreau was transferred back to federal custody while the appeal was pending. The U.S. District Court for the District of Vermont denied her request either to stay the federal case or to introduce evidence of her pending appeal to the jury.[32] The federal criminal trial commenced in July 2007.[33] The government's case relied on court orders effective through the period of the indictment to establish the parental rights of Miller.[34] Favreau's own testimony included two different affirmative defenses, both of which were rejected by the jury.[35] She was found guilty of international parental kidnapping and sentenced in February 2008 to time served and "one year of supervised release."[36]

On August 22, 2008, the Vermont Supreme Court reversed the Vermont family court order that denied Favreau's request for recognition of the Canadian judgment.[37] The Supreme Court acknowledged that the family court had jurisdiction over the 2002 custody proceedings but held that it should have declined to exercise that jurisdiction.[38] It held that the family court should have deferred to the judgment of the Canadian court.[39]

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27. *See id.*

28. *See id.* at 686 (expressing that Favreau returned to Vermont, leaving Robbie in Canada, and was arrested by federal marshals before being transferred to state custody).

29. *Id.*

30. *See id.*

31. *See id.*

32. *See Miller*, 626 F.3d at 687.

33. *See id.*

34. *See id.*

35. *See id.* (describing how the defendant pleaded two statutory affirmative defenses pursuant to 18 U.S.C. 1204(c)(1) and (c)(2). The first was that she acted within the provisions of a valid court order granted by the Canadian court, allowing her custody at the time of the offense. Her second affirmative defense was based on the assertion that she had been "fleeing an incident of domestic violence").

36. *Id.* (explaining that the sentence of time served was due to the fact that Favreau had been incarcerated since her return to the United States in January of 2006).

37. *See id.* (citing Miller v. Miller, 965 A.2d 524, 531–35 (2008)).

38. *See Miller*, 626 F.3d at 687.

39. *See id.*

III. Discussion

A. Claim for Exclusion of Evidence

The government's burden was to prove the following, pursuant to the international parental kidnapping statute: (1) that the defendant's child had previously been in the United States; (2) that the defendant took the child into another country or prevented his return to the United States from another country; and (3) that defendant "acted with the intent to obstruct the lawful exercise of [the other parent's] parental rights."[40] The court found that the evidence of guilt provided by the government was sufficient to support all three prongs necessary for the finding of international parental kidnapping in accordance with the statute.[41] Robbie had been in the United States previously, Favreau took Robbie into another country from the United States and prevented him from returning to the United States, and Favreau acted with intent to obstruct Miller's exercise of his parental rights.[42]

Defendant argued that the federal district court erred in its decision to exclude evidence regarding her pending appeal of the Vermont family court's order that awarded full custody to Miller.[43] The Appellate Court of the United States based its decision on the principle that district courts are given "wide latitude" in the determination of the admissibility of evidence.[44] As a result, it upheld the district court's decision to exclude the evidence of the pending appeal.

The defendant also wanted to introduce evidence of her Canadian custody order.[45] In its discretion, the court allowed her to introduce evidence of her application for custody in the Canadian court but not the actual order itself.[46] The district court permitted the evidence of her application for custody due to its "potential relevance to Favreau's defense that she lacked the requisite criminal intent under the statute."[47] However, the court did not permit the defendant to mention the content or outcome of the Canadian custody order, finding it was not relevant to her defense and could be confusing.[48]

The court took judicial notice of past decisions handed down by other courts (the Vermont Supreme Court's decision in particular) and chose not to "pass on the merits" of these decisions.[49] The defendant contended that the decision of the district court to exclude certain

40. *See id.* at 688 (referencing 18 U.S.C. § 1204(a)).

41. See *id.* at 690.

42. *See id.* at 688.

43. *See id.*

44. *See Miller,* 626 F.3d at 688 (citing SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 467 F.3d 107).

45. *See id.* at 689.

46. *See id.*

47. *Id.*

48. *See id.* (*citing* Fed. R. Evid. 403; United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1193 (2d Cir. 1989) (granting courts broad discretion to exclude evidence, even if deemed relevant, if probative value outweighed substantially by the danger of confusion).

49. See *id.* at 688.

evidence prevented her from asserting an affirmative defense and should be reviewed de novo.[50] The defendant's argument was found to be without merit. The appellate court upheld the district court's decision, finding no abuse of discretion or error on its part.[51] This finding was based on the understanding that the Federal Rules of Evidence excluded evidence that is not relevant.[52] It upheld the previous decision of the district court that evidence of the appeal was not relevant, because it did not have any bearing on the determination of any of the facts at issue.[53]

The defendant's argument that evidence of her appeal of the Vermont family court order (granting Miller lawful parental rights to full custody) was relevant to her intent was found to be without merit.[54] The Vermont court order at issue did not exist when Favreau went to Canada with Robbie. The court found her argument ignored a basic principle that "lawful parental rights" created by the 2002 Vermont ruling came into existence only upon its issue.[55] Thus, her appeal "could not be probative of Miller's rights at the time that Favreau went to Canada with her son."[56] She was ordered to comply with the Vermont court order in a prompt fashion upon its issue, which she did not by keeping Robbie in Canada.[57]

Furthermore, the pending nature of the appeal does not negate the existence of the parental rights of Miller.[58] The court found that, at most, it would only tend to display Favreau's disagreement with the establishment of those parental rights. It would not negate them.[59] The court also mentioned that even if it were to disagree with the ruling of the district court, it would not overturn it unless the ruling on the relevance of the evidence constituted "manifest error."[60] The court did not see any basis for this determination. The court explained that even if a finding of "manifest error" had been found, that error would have been deemed harmless.[61] The error was harmless in the face of the overwhelming evidence provided by the government to establish the defendant's guilt.[62] The court maintained that the crime could be proved based

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50. *See Miller*, 626 F.3d at 688.

51. *See id.*

52. *See* Fed R. Evid. 401 (defining relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

53. *See Miller*, 626 F.3d at 688.

54. *See id.*

55. *See id.* at 689.

56. *Id.* at 688.

57. *See id.* at 689 (citing Maness v. Meyers, 419 U.S. 449, wherein it is a basic "proposition that all orders and judgments of courts must be complied with promptly" and "absent a stay, he must comply promptly with the order pending appeal").

58. *See id.*

59. *See Miller*, 626 F.3d at 689 (citing United States v. Krager, 711 F.2d 6, 7 (2d Cir. 1983) (describing how a good-faith misunderstanding of law may negate willfulness, but a good-faith disagreement of the law will not).

60. *See id.* (citing United States v. Dihnsa 243 F.3d 635, 649 (2d Cir. 2001) (explaining that manifest error is found only where the trial judge ruled in both an arbitrary and irrational fashion).

61. *See* Fed R. Crim. P. 52 (noting that a manifest error is not sufficient to call for a reversal if it does not affect substantial rights).

62. *See Miller*, 626 F.3d at 690.

on the Massachusetts family court order that had initially granted Miller the supervised visits, alone.[63]

B. Claim for Grant of Continuance

The defendant argued that a continuance should have been granted by the district court until a decision was reached in the Vermont court regarding her appeal to the order granting Miller full custody.[64] The appellate court decided not to overturn the district court's decision, concluding that the district court did not abuse its discretion in denying the continuance.[65] An appellate court will overturn a district court's denial only if the defendant is able to prove an abuse of discretion, proving both arbitrariness and prejudice.[66] The appellate court found the defendant was unable to establish either. The defendant was said to have failed to identify any basis on which the district court's decision was arbitrary.[67] Furthermore, she was unable to establish prejudice.[68] The appeal, or its outcome, was not relevant to Miller's parental rights during the indictment period, because the Vermont order was still in effect and binding on the defendant.[69]

C. Claim of Insufficient Evidence

The defendant alleged that the evidence provided to establish her intent to obstruct parental rights was insufficient.[70] The court reviewed the defendant's claim de novo while maintaining that the burden to disprove the weight of the evidence was on the defendant.[71] When the Court of Appeals reviews a challenge regarding the sufficiency of evidence, the defendant has the burden of proof.[72] Evidence offered to meet this "heavy burden" is viewed in the light most favorable to the prosecution.[73] The court would affirm the district court if it showed that "any rational trier could have found the essential elements."[74] The court found that, here, a rational jury would have sufficient evidence to find that the defendant acted with intent to obstruct the parental rights of her ex-husband.[75] She remained in Canada with her child while possessing the knowledge that she was violating Miller's rights.[76] She had knowledge of his parental rights,

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63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*; *see also* Farias v. Instructional Sys., Inc., 259 F.3d 91, 100 (2d Cir. 2001) (stating that the "Court will affirm orders denying continuances unless there is a showing both of arbitrariness and of prejudice to the defendant").

67. *See id.* at 690.

68. *See Miller*, 626 F.3d at 690.

69. *See id.*

70. *See id.*

71. *See id.* at 690–91.

72. *See id.* (citing United States v. Mercado, 573 F.3d 138, 140 (2d Cir. 2008)).

73. *See id.* at 691.

74. *Miller*, 626 F.3d at 691 (citing United States v. Ionia Mgmt. S.A., 555 F.3d 303, 309 (2d Cir. 2009)).

75. *See id.*

76. *See id.*

exemplified by the original divorce decree and the subsequent Massachusetts family court order granting him at least six supervised visits.[77] Thus, when viewing the evidence in the light most favorable to the prosecution, the court found she did not meet her burden of proof.[78]

IV. Dissent

Judge Straub dissented from the decision to uphold the district court's exclusion of evidence.[79] In his view, the excluded evidence (the pending appeal) tended to show a lack of specific intent on the part of the defendant.[80] As a result, the intent requirement of the international parental kidnapping statute would not be satisfied. The dissent stated that evidence of the pending Vermont family court appeal would tend to show that Favreau's intent was to establish her own parental rights, not to obstruct Miller's rights.[81] Furthermore, the dissent found that the District Court did commit a "manifest error" in excluding that evidence and, thus, exceeded its discretion.[82] Furthermore, Justice Straub found that the excluded evidence went to a material element of the alleged crime and did not constitute a harmless error.[83]

The dissent asserted that Favreau should be permitted to introduce evidence showing that she did not intend to obstruct Miller's parental rights.[84] Judge Straub therefore would have ordered that the case be remanded for further proceedings, including a new trial.[85]

V. Conclusion

The U.S. of Appeals for the Second Circuit affirmed the judgment of the U.S. District Court for the District of Vermont in convicting the defendant of international parental kidnapping.[86] The appellate court denied the defendant's claims that the district court abused its discretion in excluding evidence of the defendant's appeal of a Vermont family court decision, granting her ex-husband custody of their son.[87] The decision of the district court to deny a motion for a continuance was also upheld.[88]

The appellate court found that the evidence was sufficient to support the finding that the defendant acted with intent to obstruct her ex-husband's parental rights when she knowingly

77. *See id.*
78. *See id.*
79. *See id.*
80. *See Miller*, 626 F.3d at 691.
81. *See id.* at 692.
82. *See id.* at 694.
83. *See id.*
84. *See id.*
85. *See id.* at 695.
86. *See Miller*, 626 F.3d at 691.
87. *See id.* at 688.
88. *See id.* at 690.

took their son across the United States border into Canada.[89] The appellate court upheld the district court's conviction in its finding that all elements of international parental kidnapping, as established in 18 U.S.C.A. § 1204(a), had been sufficiently proven by the government.

It is arguable, as the dissent points out, that the district court's exclusion of evidence did constitute manifest error. In the event this case is appealed to the U.S. Supreme Court, the defendant may challenge this holding and claim that the exclusion of certain evidence supported a finding that she lacked the specific intent required to find a conviction in 18 U.S.C.A. § 1204(a).[90]

This case impacts parents who wish to protect their children from abuse and those parents trying to protect their children from kidnapping by the other parent. Ultimately, the district court's finding that this constitutes international kidnapping may dissuade a parent from leaving the country without the consent of the other parent. However, it may be argued that this leaves little room for the prevention or protection of those affected by domestic or child abuse and the ability of one parent to escape and to do something that is in the best interests of the child. Since the court did not allow certain evidence supporting the defendant's claims, it may dissuade others in positions similar to that of Michelle Favreau.

Samantha Cucolo

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89. *See id.* at 691.

90. *See id.*

In re Alyazji

25 I&N Dec. 397 (BIA 2011)

The Board of Immigration Appeals held that "admission" for purposes of removal following a conviction for a crime of moral turpitude under the Immigration and Nationality Act is the presence of the alien in the United States.

I. Holding

In *In re Alyazji*,[1] the Board of Immigration Appeals (BIA) held that the proper interpretation for "admission" under the Immigration and Nationality Act § 237(a)(2)(A)(i),[2] which authorizes the removal of an alien following a conviction for a crime of moral turpitude committed within five years after the date of admission, is the lawful entry or adjustment of status "by virtue of which the alien was present in the United States."[3] The BIA's decision overrules in part *In re Shanu*,[4] which held that "a conviction for a crime of moral turpitude supported removal as long as the crime was committed within 5 years of *any* admission" (emphasis preserved).[5]

II. Facts and Procedural History

Alla Adel Alyazji (Alyazji), a native and citizen of Palestine, entered the United States in August 2001 as a nonimmigrant.[6] In April 2006, Alyazji adjusted his status to lawful permanent resident of the United States.[7] In January 2008, Alyazji was convicted of indecent assault in Pennsylvania in 2007.[8] Following his conviction, the Department of Homeland Security (DHS) initiated removal proceedings under § 237(a)(2)(A)(i) of the Immigration and Nationality Act (INA), which states:

> 1. Any alien who is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) after the date of admission, and
> 2. is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.[9]

Alyazji filed a motion requesting termination of deportation proceedings on the grounds that his "conviction resulted from an offense committed more than five years after his 'admis-

1. 25 I&N Dec. 397 (BIA 2011).
2. 8 U.S.C. § 1227(a)(2)(A)(i) (2006).
3. *Alyazji*, 25 I&N at 398.
4. *Shanu*, 23 I&N at 754.
5. *Alyazji*, 25 I&N at 397.
6. *See id.* at 398.
7. *See id.*
8. *See id.*
9. INA § 237(a)(2)(A)(i).

sion' to the country as a nonimmigrant in August 2001."[10] The Immigration Judge (IJ) denied Alyazji's motion, citing *In re Shanu*,[11] because Alyazji committed the offense less than five years after his "admission" to lawful permanent resident status in April 2006.[12] Alyazji acknowledged *Shanu* in his motion but argued that the court should decline to follow that precedent because numerous reviewing courts had criticized its rationale.[13] The IJ denied the motion, stating that he was obligated to follow *Shanu*. Alyazji appealed the decision to the BIA.

III. Discussion

A. Historical Applicability of § 237(a)

Generally, the grounds for removal under of the INA § 237(a) apply to only aliens "in and admitted to the United States."[14] The BIA has historically interpreted this language to include aliens in the following two categories:

1. those who entered the United States with permission of an immigration officer after being inspected at a port of entry; and
2. those who entered without permission or were paroled, but who subsequently became permanent residents.[15]

Those who fall into the second group may not have been "admitted" under INA §101(a)(13)(A),[16] which defines "admission" to mean "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[17] However, once an alien adjusts his status to that of lawful permanent residency, which allows one to work and live in the United States, he has obtained the same status as one who has been admitted at a border with an immigrant visa.[18]

The BIA outlined the historical policy reasons for defining adjustment of status as an admission when deportability for commission of a crime of moral turpitude is at issue. The BIA noted that an alien may enter the country as a nonimmigrant student, tourist, temporary employee, or business visitor in the first instance and may be readmitted to the country in a different context (including that of adjustment to lawful permanent residency). The BIA noted that the courts have consistently held each lawful entry (with inspection) to be an admission under INA § 237.[19]

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10. *Id.*
11. *Shanu*, 23 I&N at 754.
12. *See Alyazji*, 25 I&N at 398.
13. *See id.* at 399.
14. INA § 237(a).
15. *Alyazji*, 25 I&N at 399.
16. 8 U.S.C. § 1101(a)(13)(A) (2006).
17. INA § 101(a)(13)(A).
18. *See Alyazji*, 25 I&N at 399; *see also* In re Smith, 11 I&N Dec. 112 (BIA 1977).
19. *See Alyazji*, 25 I&N at 400.

Alyazji was to be deported pursuant to § 237(a)(2)(A)(i), which required a conviction for a crime of moral turpitude committed within five years after the alien's "date of admission."[20] When an alien had multiple admissions, as did Alyazji, the admission for purposes of determining the five-year period was critical to whether the alien would be deported. The vague statutory language thus made the issue ripe for review.

In *Shanu*, the BIA found that each time an alien was admitted, the five-year clock would reset.[21] As in Alyazji's case, Shanu's most recent admission was his adjustment of status to lawful permanent residency. Shanu had committed a crime of moral turpitude less than five years after he obtained lawful permanent residency; he was summarily deported.[22] Thus, a crime of moral turpitude committed "within five years after the date of *any* admission" would result in the alien's removal (emphasis preserved).[23]

B. Adjustment of Status as an Admission

The board conceded that there was some disagreement among the federal courts of appeal with regard to treating adjustment of status as an admission under section INA § 237(a)(2)(A)(i).[24] Counsel and amicus for Alyazji advocated treating adjustment of status as an admission *only* with regard to those aliens who had never been previously "admitted" within the meaning of INA §101(a)(13)(A), which defines an admission as "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[25] The board took issue with this proposal, opining that although it would simplify the inquiry in Alyazji's case, adopting this approach would create broader negative implications in future cases.[26]

The board presented two hypothetical situations in which adoption of the proposed statutory interpretation of "admission" would trigger unjust results. In the first scenario, an alien who was admitted to the country on a tourist visa as a child with his parents, returned to his

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20. 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

21. *See Shanu*, 23 I&N at 754.

22. *See id.*

23. *Alyazji*, 25 I&N at 397.

24. *See id.* at 397, 401–02. The BIA discussed decisions in which the courts universally interpreted "admission" to include adjustment of status in cases arising under other sections of the INA; *see* Lemus-Losa v. Holder, 576 F.3d 752, 757 (7th Cir. 2009) (holding the alien was inadmissible under INA § 212(a)(9)(B)(i)(II) because "admission" in the INA generally included adjustment of status); *see also* Ocampo-Duran v. Ashcroft, 254 F.3d 1133, 1134–35 (9th Cir. 2001) (finding adjustment of status was an "admission" under INA § 237(a)(2)(A)(iii), which allowed for removal of an alien "convicted of an aggravated felony at any time after admission").

25. 8 U.S.C. § 1101(a)(13)(A). The BIA noted that the Sixth and Fourth Circuits had held that the term "admission" under INA § 237(a)(2)(A)(i) was governed by the language in INA § 101(a)(13)(A); *see* Zhang v. Mukasey, 509 F.3d 313, 315–16 (6th Cir. 2007) (upholding petitioner's definition of her date of admission to be her date of lawful entry under INA § 101(a)(13)(A)); *see also* Aremu v. Dep't of Homeland Sec., 450 F.3d 578, 581 (4th Cir. 2006) (concluding admission does not include adjustment of status). The Seventh Circuit also found adjustment of status was not an admission under § 237(a)(2)(A)(i) because there was no precedent from the BIA to suggest otherwise. *See* Abdelqadar v. Gonzales, 413 F.3d 668, 673–74 (7th Cir. 2005) (holding that definition of "admission" under 8 U.S.C. § 1227(a)(2)(A)(iii) did not create a new definition for "admission" under INA § 237(a)(2)(A)(i)).

26. *See Alyazji*, 25 I&N at 402.

home country, and then reentered the United States as an adult without inspection only to adjust status later, would be immune from deportation for a crime of moral turpitude committed as an adult.[27] The board reasoned that if the alien's adjustment of status were not treated as an admission, he would not be deported under INA § 237(a), because the crime could not have been committed within five years of his nonimmigrant admission.[28]

In the second scenario, the board highlighted the adverse humanitarian consequences of this approach. The board noted that aliens who sought waivers of inadmissibility in their applications to adjust status based on hardship to family members living in the United States would be ineligible for relief, because their adjustment of status would not be read as an admission.[29]

DHS also proposed a change in statutory interpretation of admission to avoid these results, opining that the BIA should adopt a "flexible" approach given the multiple applications of "admission" throughout the INA.[30] The board rejected this argument as well, citing the need for statutory consistency.

C. The "Date of Admission"

Although the board declined to adopt either approach in interpreting the meaning of "admission," the BIA overruled *Shanu* in part, commenting that it had "placed too much focus on historical practice and too little on the actual language of the current statute."[31]

Returning to a historical discussion of statutory interpretation of "admission" to reach its decision, the board reviewed Congress's reorganization of the deportability grounds. In 1997, the term "entry" was replaced with "admission," such that the statute focused on convictions for a crime of moral turpitude committed "within five years after the date of admission," instead of crimes committed within five years "after the date of *entry*" (emphasis added).[32] The board found that by substituting "the date of admission" for "entry," Congress intended to restrict the definition to a singular date of entry in relation to the offense committed.[33] Moreover, only one date of admission would trigger the five-year clock in cases where an alien had multiple admissions.[34]

The BIA further clarified that the phrase "date of admission" will refer to the date of the admission "by virtue of which the alien was present" in the United States when the alien committed the crime, adding a new wrinkle in the statutory interpretation of the term "admis-

27. *See id.* at 402–03.

28. *See id.*

29. *See id.* at 403.

30. *See id.* at 404.

31. *Id.* at 405.

32. *Alyazji*, 25 I&N at 405; *see also* INA § 241(a)(2)(A)(i)(I).

33. *See Alyazji*, 25 I&N at 405.

34. *See id.*

sion."[35] Acknowledging the possible continued ambiguities of INA § 237(a), the BIA emphasized that the admission of consequence is that which establishes the alien's *lawful presence* in the United States, namely, the earlier of lawful entry (with inspection) or "admission" by adjustment of status. That is, "the 5-year clock is not reset by a new admission *from within* the United States," for example, an adjustment to lawful permanent residency (emphasis preserved).[36]

IV. Conclusion: The Creation of a "Readmission"

Although the BIA rejected both parties' arguments for redefinition of an admission, the board created a new category of admission for purposes of statutory interpretation under INA § 237(a), that of "the admission pursuant to which the alien is present."[37] By distinguishing between admissions pertinent to an offense committed under 237(a) and subsequent admissions, or "readmissions," the board reversed the IJ's decision to deport Alyazji and opened the door for future applicants to challenge orders of deportation.[38] This decision may have future implications in other immigration contexts, including asylum and cancellation of removal claims, where the date of admission also determines the statutory standard for relief.

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35. *Id.*
36. *Id.* at 406.
37. *Id.*
38. *See id.* at 408.

Chevron Corporation v. Berlinger

Nos. 10-1918-cv, 10-1966-cv, 2011 U.S. App. LEXIS 629; (2d Cir. Jan. 13, 2011).

The Court determined that the creator of a documentary about violations against human and environmental rights in Ecuador was not entitled to journalist's privilege.

I. Holding

In *Chevron Corp. v. Berlinger*,[1] the Second Circuit held that Berlinger failed to demonstrate that in the making of his documentary film, he collected information for purposes of "independent reporting and commentary,"[2] so that the district court possessed the discretion to order the production of the film outtakes.[3] The court was compelling discovery for a case being litigated concurrently in Ecuador.[4] The court determined that these materials could be used only for the litigation, arbitration or submission to official bodies.[5]

II. Facts and Procedural History

The request for Berlinger's materials was in relation to what his film covers: 30 years of oil exploration and collection in Ecuador by Texaco, Inc. (Texaco), which became a subsidiary of Chevron Corp. (Chevron) in 2001.[6] Texaco's activities in Ecuador were carried out by its subsidiary Texaco Petroleum Company (TexPet) and included operating an oil pipeline and drilling activities in conjunction with the state-owned company, Petroecuador.[7] These oil pipeline and drilling activities began in 1964. Texaco ended its interests in the consortium with Petroecuador in 1992.[8] 1n 1993, a class action lawsuit was filed against Texaco in the U.S. District Court for the Southern District of New York by a group of residents of the Oriente region of Ecuador[9] claiming that in its time of operation, TexPet had polluted rain forests and rivers in Ecuador.[10] Seeking to redress water contamination and harm to the environment, the plaintiffs sought billions of dollars in damages.[11]

Subsequently, Texaco entered into agreements with the Ecuadorean government to perform remedial actions in exchange for releasing it from liability.[12] Eventually, Texaco was

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1. Nos. 10-1918-cv, 10-1966-cv, 2011 U.S. App. LEXIS 629 (2d Cir. Jan. 13, 2011).
2. *Id.* at *1.
3. *See id.* at *1–*2.
4. *See* In re Chevron Corp., 2010 U.S. Dist. LEXIS 47034 (S.D.N.Y. May 10, 2010).
5. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *8.
6. *See id.* at *6.
7. *See id.*
8. *See id.*
9. *See id.* at *7 (an area of rivers and rain forest in the eastern portion of Ecuador).
10. *See id.*
11. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *7.
12. *See id.* at *7–*8.

deemed by the government of Ecuador to have fulfilled its obligations and was released from liability.[13] During this time, Texaco was working to have the class action suit transferred from New York to Ecuador.[14] The U.S. courts agreed to let the Ecuadorean courts handle it and dismissed the U.S. case.[15] A group of Ecuadorian citizens then brought an action, known as the Lago Agrio Litigation, against ChevronTexaco in Ecuador.[16] They brought charges against ChevronTexaco, but there was not sufficient evidence to pursue criminal charges against some of the individuals.[17]

In 2005, the lead counsel for the plaintiffs in the suit enlisted the help of Berlinger to create a documentary depicting the Lago Agrio Litigation from his clients' perspective.[18] As the court states, for three years "Berlinger shadowed the plaintiffs' lawyers and filmed 'the events and people surrounding the trial,' compiling six hundred hours of raw footage."[19] Meanwhile, a new president, Rafael Vincente Correa Delgato[20] and, subsequently, his new prosecutor general determined that the criminal charges against individuals, which had previously been abandoned, should proceed.[21] In subsequent international arbitration, Chevron asserted that the Ecuadorian government abused its power in regard to the Lago Agrio Litigation and that the litigation should be dismissed.[22]

In 2009, Berlinger released *Crude*,[23] which captures both the trial and the environmental and human damages allegedly caused by the oil spills.[24] In some of the raw footage that did not make it to the final cut, there was some information that was counter to the citizens' cause. There was a video recording of a meeting with an expert witness who gave a neutral damage assessment and used "pressure tactics" to influence a judge to block the inspection of a laboratory used by the Lago Agrio plaintiffs.[25] There is also a scene in which the plaintiffs meet with

13. *See id.* at *8.

14. *See id.*

15. *See id.* (stating that the U.S. District Court for the Southern District of New York dismissed the case, and that the Second Circuit then affirmed the dismissal).

16. *See id.* at *10–*11.

17. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *10–*11 (alleging that criminal charges of violations of environmental law and falsifying documents were being sought against two of Chevron's lawyers, Veiga and Pallares; but, according to the District Prosecutor, "'there [was] not sufficient evidence to pursue the case against [them]'").

18. *See id.* at *11.

19. *Id.*

20. *Profile: Ecuador's Rafael Correa*, BBC.CO.UK, http://www.bbc.co.uk/news/world-latin-america-11449110 (last visited Apr. 3, 2011) (describing Correa as a United States-trained economist, a self-proclaimed member of the "Christian left," and a friend of Hugo Chavez. Correa has not been hesitant to stand up to larger nations or oil companies when it comes to his country's natural resources.).

21. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *12.

22. *See id.* at *12–*13.

23. *Crude* (Entendre Films 2009) (premiered at the 2009 Sundance Film Festival).

24. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *13.

25. *See id.* at *14.

the president of Ecuador and say some unflattering things about their adversaries and emphasize the importance of their relationship with President Correa.[26]

Chevron and the individuals being prosecuted requested that Berlinger disclose all the raw footage he took during the filming of *Crude*.[27] The Lago Agrio plaintiffs attempted to prevent this, but the district court found that the plaintiffs solicited Berlinger to make this film and additionally found that Berlinger removed scenes at their request.[28] Therefore, the district court ordered that the outtakes be disclosed.[29] Berlinger appealed and moved for a stay of the district court's order.

III. Discussion: Journalist's Privilege

Berlinger contends the district court abused its discretion in ordering him to turn over the footage and rejecting his claim of journalistic privilege.[30] The Court of Appeals for the Second Circuit held that a person need not have promised secrecy or be a credentialed reporter to be entitled to journalist's privilege.[31] The Second Circuit stated that it had "long recognized a qualified evidentiary privilege for the information gathered in a journalistic investigation."[32] The court also acknowledged that there may be serious harm in forcing journalists to reveal information.[33] It recognized the need to have an aggressive and independent press, and that the ability of parties in litigation to gain access to a journalist's information is accordingly limited.[34] The court did not want journalists to have to breach promises of confidentiality to their sources.[35] In this case, however, the district court found that the plaintiffs in the ChevronTexaco litigation solicited Berlinger to create the documentary, and he removed at least one scene from his final cut at their request.[36] The Court of Appeals for the Second Circuit determined that with this information it was not unreasonable for the district court to conclude that Berlinger's claim of privilege was overcome.[37] The court stated,

> The privilege is designed to support the press in its valuable public service of seeking out and revealing truthful information. An undertaking to publish in order to promote the interest of another, regardless of justification, does not serve the same public interest, regardless of whether the resultant work may prove to be one of high quality.[38]

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26. *See id.* at *15.
27. *See id.* at *16–*17.
28. *See id.* at *16.
29. *See id.* at *19.
30. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *22.
31. *See id.* at *24.
32. *See id.* at *22.
33. *See id.* at *23.
34. *See id.* at *22–*23.
35. *See id.* at *23.
36. *See Chevron Corp.*, 2011 U.S. App. LEXIS 629, at *28.
37. *See id.* at *28.
38. *See id.* at *27–*28.

Berlinger did not submit any evidence that the persons filmed requested that the footage of them be held in confidence.[39]

Berlinger also argued that the information Chevron sought was not relevant to the foreign proceedings and that some of that information was already available to it, because Chevron filmed portions of the proceedings itself.[40] The court determined that Berlinger's failure to demonstrate his independence from the litigants was sufficient to determine that the district court did not err in rejecting his claim.[41]

Berlinger made two other arguments in his attempt to overturn the district court's ruling. He alleged that those who appear in the unedited footage expected confidentiality,[42] and that even if journalist's privilege were overcome, the order was overbroad and should include only the relevant portions of his footage.[43] The court rejected the expectation-of-confidentiality argument because there was no corroborative evidence to support his claim.[44] The court rejected his claim of the order being overbroad, because the "district court enjoys greater discretion to order production of privileged material when the person asserting the press privilege fails to carry his burden of showing that he acted with journalistic independence" and because Berlinger did not provide the district court with any proposed method for figuring out which film footage was relevant.

IV. Conclusion

The court, here, determined that the material produced as a result of the district court's order shall be used only for litigation, arbitration, or submission to official bodies.[45] The idea that the material was produced in the furtherance of the cause against Chevron played a significant role in the court's willingness to compel Berlinger to turn it over.[46] The case was remanded to the district court for all purposes.[47]

The result of the Lago Agrio Litigation was that the Ecuadorean court awarded the plaintiffs $9 billion in damages.[48] Recently, however, the U.S. District Court for the Southern Dis-

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39. *See id.* at *32.

40. *See id.* at *30.

41. *See id.* at *32.

42. *See* Chevron Corp., 2011 U.S. App. LEXIS 629, at *32.

43. *See id.* at *33.

44. *See id.*

45. *See id.* at *35.

46. *See id.* at *28.

47. *See Id.* at *35.

48. *See* Simon Romero & Clifford Krauss, *Chevron Ordered to Pay $9 Billion for Ecuador Pollution*, N.Y. TIMES, Feb. 15, 2011, at A4.

trict of New York ruled that the successful plaintiffs from Ecuador cannot seek damages in the United States or in other countries.[49] The U.S. court also raised concern about the legitimacy of the judgment against Chevron.[50]

This ruling is very significant because the judgment is enforceable only in Ecuador, and Chevron currently holds no assets there.[51] If possible, the plaintiffs would have tried to enforce the judgment they received by going after Chevron's assets in the United States and other nations.[52] The Ecuadorean plaintiffs assert that they are not under the jurisdiction of that court or of Judge Kaplan, who wrote the opinion and granted a preliminary injunction[53] against the Ecuadorean plaintiffs, and that "he does not have authority to enjoin them from seeking enforcement outside of the United States with non-U.S. attorneys."[54]

Erick Kraemer

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49. *See* Lawrence Hurley, *Chevron Wins Injunction Against Ecuadorean Plaintiffs*, N.Y. TIMES ENERGY & ENVIRONMENT, Mar. 8, 2011, http://www.nytimes.com/gwire/2011/03/08/08greenwire-chevron-wins-injunction-against-ecuadorean-pla-52066.html.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See* Chevron Corp. v. Donziger, No. 1:11-cv-00691-LAK, 2011 U.S. Dist. LEXIS 22729, at *1 (S.D.N.Y. Mar. 7, 2011).

54. *See* Hurley, *supra* n. 49.